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No. 05-11287

Supreme Court, U.S.
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In The
Supreme Court of the United States

BRENT RAY BREWER,

Petitioner,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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JOINT APPENDIX

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Petition For A Writ Of Certiorari Filed May 30, 2006
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DOCKET ENTRIES

U.S. District Court
Northern District of Texas (Amarillo)
CIVIL DOCKET FOR CASE #: 2:01-cv-00112
Brewer v. Douglas Dretke, Director TDCJ-CID, et al

* * *

03/19/2001 MOTION by Brent Ray Brewer to proceed in forma pauperis (3)(uls) (Entered: 03/20/2001)

* * *

03/22/2001 ORDER granting [2-1] motion to proceed in forma pauperis and Order to Supplement. Petitioner ordered to supplement the record on or before 4/16/01 w/In Forma Pauperis Data Sheet from the institution in which he is confined, serving respondent w/copy of such data sheet. Signed by Magistrate Judge Clinton E. Averitte) Copies to counsel: 3/23/01 Page(s) 2 (uls) (Entered: 03/23/2001)

* * *

05/07/2001 PETITION for writ of habeas corpus; (19+)(uls) (Entered: 05/07/2001)

05/07/2001 MEMORANDUM by Brent Ray Brewer in support of [8-1] petition (39)(uls) (Entered: 05/07/2001)

* * *

6/28/2001 ANSWER to Complaint with Brief in Support by respondent Director of TDCJ-ID (Attorney Edward L Marshall) (45)(jeh) (Entered: 06/28/2001)

* * *

09/30/2002 FIRST AMENDED PETITION for writ of habeas corpus by a Person in State Custody "Under Protest" (66)(uls) (Entered: 10/01/2002)

* * *

06/24/2004 ORDER – Today, the US Supreme Court issued its decision in Tennard v Dretke, 2004 WL 1402731, No. 02-10038. The parties are ordered to submit a supplemental brief on the impact of the Tennard decision in Petitioner's case. The briefs must not exceed ten pages in length and must be filed by 4:00 pm, Tuesday, 7/6/04. (Signed by Judge Mary Lou Robinson on 3/24/04) (plh,) (Entered: 06/24/2004)

* * *

08/02/2004 Memorandum Opinion and Order Conditionally Granting Petition for Writ of Habeas Corpus – For each of the reasons set out (see Order), Petitioner's sixth claim for relief is granted and each of the other claims for relief is denied. A writ of habeas corpus shall issue to Respondent, vacating Petitioner's sentence and commuting it to life, unless, within 180 days from the entry of the judgment in this matter, the State of Texas grants Petitioner a new sentencing hearing or commutes his sentence to life. Judgment will be entered accordingly. (Signed by Judge Mary Lou Robinson on 8/2/04) (uls,) (Entered: 08/02/2004)

08/02/2004 JUDGMENT Ordered, Adjudged, and Decreed that a writ of habeas corpus shall issue to the Respondent, vacating Petitioner's sentence and commuting it to life, unless,

within 180 days from the entry of this judgment, the State of Texas grants Petitioner a new sentencing hearing or commutes his sentence to life. (Signed by Judge Mary Lou Robinson on 8/2/04) (uls,) (Entered: 08/02/2004)

08/16/2004 NOTICE OF APPEAL as to 51 Memorandum Opinion and Order,,, 52 Judgment, by Douglas Dretke, Director TDCJ-CID. Filing fee $ 255, receipt number 39691 (jeh,) (Entered: 08/17/2004)

* * *

DOCKET ENTRIES

US Court of Appeals for the Fifth Circuit
Court of Appeals Docket #: 04-70034
Brewer v. Dretke

* * *

11/15/04	Appellant's Brief filed by Appellant Doug Dretke. Copies of Brief: 7 # of pages: 20 Date of COS: 11/12/04 Disk Provided [Y/N]: Y Sufficient [Y/N]: Y . [5000152-1] [04-70034] A/Pet's Brief ddl satisfied. E/Res's Brief due on 12/15/04 for Brent Ray Brewer. (mrw)

* * *

1/12/05	Appellee's Brief filed by Appellee Brent Ray Brewer. Copies of Brief: 8 # of pages: 24 Word count: 5,973 Date of COS: 1/10/05 Disk Provided [Y/N]: Y Sufficient [Y/N]: Y . [5050655-1] [04-70034] E/Res's Brief ddl satisfied. Reply Brief due on 1/26/05 for Doug Dretke. (mrw)

* * *

1/26/05	Reply brief filed by Appellant Doug Dretke. Copies of Brief: 7 # of pages: 5 Date of COS: 1/25/05 Disk Provided [Y/N]: Y Sufficient [Y/N]: Y. [5062327-1] [04-70034] Reply Brief ddl satisfied. , (mrw)

* * *

5/31/05	Opinion filed. Issd in T form? Y Mandate pull date is 6/21/05. [04-70034] (kgc)
5/31/05	Judgment entered and filed. [04-70034] (kgc)

* * *

6/28/05	Petition filed by Appellee Brent Ray Brewer for rehearing en banc. # of copies filed: 21 [5209434-1] Date of COS: 6/27/05 Sufficient [Y/N]: Y [04-70034] (mrw)
7/13/05	Response/opposition filed by Appellant Doug Dretke to petition for rehearing en banc [5209434-1] by Appellee Brent Ray Brewer Response/Opposition ddl satisfied. Date of COS: 7/12/05 Sufficient [Y/N]: Y [5223412-1] [04-70034] (mrw)
	* * *
3/1/06	COURT Order filed denying appellee's petition for rehearing. [5384114-1] Copies to all counsel. [04-70034] (kgc)
3/1/06	Opinion withdrawn. [5179208-1] [04-70034] (kgc)
	* * *
3/1/06	Opinion filed. Issd in T form? Y Mandate pull date is 3/22/06. [04-70034] (kgc)
3/1/06	Judgment entered and filed. [04-70034] (kgc)
	* * *

NO. 6997-A

THE STATE OF TEXAS) IN THE 47TH DISTRICT COURT
VS.) IN AND FOR
BRENT RAY BREWER) RANDALL COUNTY, TEXAS

* * *

[678] RICHARD LEPICIER,

called as a witness by the State, having been first duly sworn by the Court, testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. FRISTOE:

Q. State your name for the Court, please.

A. Richard Lepicier.

Q. And Mr. Lepicier, where do you reside, please?

A. Monroe County, Mississippi.

Q. And, sir, how are you employed there, please?

A. Deputy Sheriff, Monroe County Sheriff's Department.

Q. And how long have you been in law enforcement?

[679] A. Since April of '86.

Q. All right, sir. Let me take you back to July of 1989, if you would, please, and ask if on that occasion, you had the necessity to answer a family disturbance call at the home of a William Albert Brewer.

A. Yes, sir.

Q. And are you familiar with – I think everybody calls him Albert Brewer.

A. That's the way I know him.

Q. How long have you known him?

A. Off and on for a short period of time; several months, I guess, prior to that, on several other calls in that area.

Q. All right, sir. The occasion of July the 14th of 1989, explain to the jury, please, why you were dispatched to the Brewer home, please.

A. The initial call, I believe, came from the hospital. They had dispatched an ambulance out there on a domestic disturbance. Initial report that somebody had been assaulted with a broom.

When I got out there, Mr. Brewer, Albert, was down, bleeding. He was mouthing, trying to speak, but he couldn't speak. There was blood on his shirt, there was some splatter on the wall and what-not.

Q. All right, sir. And during the course of your [680] investigation, did you obtain information as to who the assailant of Mr. Brewer was?

A. Yes, sir. Albert's wife told me that she and Mr. Brewer had an argument of some sort. I don't remember what it was about or anything, and Brent had gotten onto his father and took a broom and hit him, knocked him down and kept hitting him and kicking him and hitting him with a broom.

Q. Okay. And when you say "Brent," are you talking about Brent Brewer?

A. Yes, sir.

Q. Do you know Brent Brewer?

A. I know him from dealings with the Sheriff's Department.

Q. All right, sir. Can you recognize him?

A. Yes, sir. It's the gentleman sitting right there.

Q. All right, sir. Would you describe his clothing, please?

A. His clothing? A blue jacket, white shirt, striped tie, hair parted on the side.

MR. FRISTOE: Your Honor, let the record reflect that the witness has identified the Defendant.

THE COURT: The record may so reflect.

[681] Q. (By Mr. Fristoe) All right. Deputy, did you have reason to observe the – I think you said it was broom?

A. Yes, sir.

Q. Could you describe that broom for the jury, please?

A. Yes, sir. It was an artificial bristle broom, what I'd call an O'Cedar broom, synthetic bristle with a hard plastic case at the top of the bristles where normal broom stitching would, you know, hold one together.

Q. And what was the condition of that broom when you observed it?

A. The narrow edge of it was shattered off. There was blood on the side of the broom. It wasn't broken apart. The handle wasn't broken, but the plastic casing, the hard plastic casing at the top of the bristles was broken.

Q. All right, sir. And did you observe Albert Brewer at that scene that day?

A. Yes, sir.

Q. And could you – I know you're not a medical doctor, but can you describe the injuries that Albert Brewer suffered that day?

A. He was bleeding in the mouth. From the nose, from the side of the head. Like I said, there was blood [682] on the front of his shirt, blood on the floor, there was blood splattering on the wall. In the room – or kitchen area was a table, and he was down in front of the table area there, fairly close to the wall.

Q. All right, sir. And you said he could just mouth.

A. Yes.

Q. He couldn't say words?

A. I was thinking at the time, he probably had a broken jaw and he was, you know, moving that mouth, but he couldn't form words.

Q. And it had been related to you that he was hit again and again and again; is that what you're saying?

A. Yes, sir.

MR. BIRDSONG: I object.

THE COURT: I'll sustain.

MR. BIRDSONG: We ask the jury be instructed to disregard Mr. Fristoe's question.

THE COURT: Disregard the question of the Prosecutor.

MR. BIRDSONG: Move for mistrial.

THE COURT: Denied.

MR. FRISTOE: Your Honor, I pass the witness.

MR. BIRDSONG: State is tendering me a [683] report, for the record.

THE COURT: Very well.

CROSS-EXAMINATION

BY MR. BIRDSONG:

Q. Deputy – how do you say your last name?

A. Lepicier.

Q. You did the investigation on this?

A. Yes, sir.

Q. Is that correct? Were you the sole officer in charge?

A. Yes, sir.

Q. And you visited with Karon Brewer and Albert Brewer?

A. I don't know Mrs. Brewer's first name.

Q. Okay. You visited with the wife, Mrs. Brewer?

A. Yes.

Q. And you went out to the scene, correct?

A. Yes, sir.

Q. You also talked to Brent Brewer?

A. I don't really recall.

Q. That's fine. What I want to ask you about is – you know, I want the jury to hear the whole picture of what was happening that night.

Did you have a chance to observe Karon, Mrs. [684] Brewer?

A. Yes, sir.

Q. She was upset, was she not?

A. Yes, sir.

Q. And you had a chance to observe Brent?

A. Yes, sir.

Q. He was upset also?

A. Somewhat, yes.

Q. And you had a chance to observe the scene, correct? You had a chance to observe the scene?

A. Yes, sir.

Q. And you know that there was signs of struggle obviously, because you testified about that. Did you see broken glass? Do you remember?

A. I don't recall.

Q. Okay. Do you recall Mrs. Brewer telling you that Albert had been beating on her?

A. Yes, sir.

Q. Pretty severely?

A. I don't recall her saying that.

Q. That's fine. Let me ask you this, sir. Do you know the relationship between Brent and Karon Brewer, Mrs. Brewer?

A. I don't know for a fact, no, sir. I assume –

Q. You have an idea that she is his mother, [685] correct?

A. Yes, that was my assumption.

Q. And you talked to the Prosecutor about your knowledge of Albert Brewer, correct?

A. No.

Q. You had dealt with him on several occasions prior to this call?

A. Yes, sir.

Q. As a matter of fact, Brent came down and talked to you specifically one time with a bloody nose that was given to him by Brent (sic), correct?

A. Yes, sir.

Q. Now, what was the time frame between that time when Brent came to you with a bloody nose from Albert and this incident here? Do you remember?

A. My dealings with the family would span several months, not – you know, I couldn't recall exactly what kind of time frame it would be.

Q. Within a couple of months?

A. Uh-huh.

Q. And you have had other calls on Albert on incidents on violentness (sic) and drunkenness, correct?

A. Problems, you know, not the violence so much, the drinking. My impression of the family is that it is not a close-knit family situation. They argue and fight a [686] good bit.

Q. Albert and Mrs. Brewer argued a lot, correct?

A. On the occasions that I was called out, that was the problem.

Q. All right. And often there was alcohol involved on the part of Albert?

A. I would say every time I have had a dealing with Albert, he was drinking.

Q. And he would be what you call a violent drunk?

A. I couldn't say that, no, sir.

Q. An abusive drunk?

A. I wouldn't say that.

Q. Verbally abusive?

A. My dealings with Albert –

Q. Can you just answer that yes or no?

A. – once I arrived at the scene, he never gave me any problem.

Q. Sir, sir, can you answer that yes or no?

A. Excuse me?

Q. Can you answer that yes or no?

A. As being violent?

Q. Verbally abusive when he is drunk.

A. I would have to say I don't know.

Q. Okay. But you've answered several calls on Albert Brewer?

[687] A. True, yeah.

Q. Okay. And you said earlier that they are always alcohol-related.

MR. FRISTOE: Your Honor, is Counsel testifying, or is that a question?

THE COURT: Is this an objection?

MR. FRISTOE: Your Honor, I just didn't know whether the witness understood the question.

THE COURT: You may clarify, Mr. Birdsong.

Q. (By Mr. Birdsong) Did you understand my question, sir?

A. Repeat it, please.

Q. The altercations were alcohol-related, yes or no.

A. That would be tough to answer yes or no.

Q. Okay. Well, just do the best you can, sir. If you can't answer it yes or no, I'll try to rephrase it.

A. I can't give you a yes or no answer.

Q. Maybe you can give me a yes or no answer to this question.

You went out there and saw Mr. Brewer at the house with – struck on the head and bleeding, right?

A. Yes, sir.

Q. And I think, in Mississippi, that would be an [688] assault charge, correct?

A. Yes, sir. We only have two assaults, simple and aggravated.

Q. And this would have an aggravated assault charge, right?

A. Yes, sir, could be,

Q. Charges weren't filed, were they?

A. No, sir.

MR. BIRDSONG: Pass the witness.

REDIRECT EXAMINATION

BY MR. FRISTOE:

Q. Officer Lepicier, why weren't charges filed?

A. Domestic violence in our county – it's hard to articulate this. It's common. I'm sure it is everywhere. But our problem, or people coming to the court, an affidavit has to be signed before a Justice Court Judge. Get a Judge

up, get an affidavit signed, warrants issued, and the next morning, the same people that signed the affidavits want to withdraw the charges. This is just a very common problem.

Q. All right. So this evening that you went to the Brewer residence, Mr. Brewer was not capable of signing an affidavit or a complaint at that point, was he?

A. No, sir.

[689] MR. BIRDSONG: Your Honor, this is leading the witness. I'd object.

THE COURT: Sustained. Please don't lead.

MR. FRISTOE: I'll rephrase it, Your Honor.

Q. (By Mr. Fristoe) Was Mr. Brewer capable of signing an affidavit that night?

A. No, sir.

Q. Did he sign an affidavit that night?

A. No, sir.

Q. Was he capable of signing an affidavit the next morning?

A. No, sir.

Q. Did you go back and talk with Albert Brewer about this incident?

A. I talked to him – I talked to his wife early. She was of the opinion that Albert would not be willing to prosecute Brent for the assault.

My next meeting with Mr. Brewer, I was in the neighborhood, stopped in to see how he was doing. At that point, his speech was somewhat better. He was hard to understand. You had to listen to him closely to get his speech.

Q. And how long was this after the incident?

A. A couple of months, I suppose.

Q. He still had speech problems a couple of months [690] after?

A. If I'm remembering the time frame right.

Q. Okay.

A. At that point, he – he didn't want Brent back. He didn't want him back in the house, and to keep him away from there. I didn't feel like I could keep him from coming back out there.

At that point, or maybe at a later date, I think him and Brent had got into another argument or something. He wanted to press charges then. I explained to him that, you know, go sign the papers.

But if I remember right, Brent was over here in Texas at the time. I told him the DA probably would not pursue it, he'd waited this long to make up his mind whether or not he wanted to press charges. The DA probably wouldn't pursue the case.

Q. So, consequently, no case was ever filed; is that correct?

A. Yes, sir.

Q. Officer Lepicier, you said previously that Mr. Brewer had problems talking, you think, a couple of months after this incident; is that what you said?

MR. BIRDSONG: Your Honor, this is repetitive and bolstering. I object.

THE COURT: Overruled.

[691] A. The time frame – we're talking about an incident here that wasn't pursued that heavily, wasn't prosecuted. I remember the incident, but, you know, the time frame and stuff, I'm not that close on.

Q. Did you know whether or not Mr. Brewer went to the hospital?

A. Yes, sir.

Q. Was he hospitalized?

A. Yes, sir.

Q. For a considerable period of time?

A. Yes, sir.

Q. So it would have been after that; is that correct?

A. It would have been after that period and at the time of the next meeting with Mr. Brewer, he had problems with his hand and leg.

Q. What kind of problems with his hand and leg?

A. Muscle control. I believe, if I remember right, it was his right side, right arm and leg. He was having trouble – and trouble with his speech. He had to sort of think, forming his words and talking and not real, real bad, but he was having trouble.

Q. Did he tell you he – did he have brain damage, is that what you're telling the jury?

MR. BIRDSONG: Judge, this is leading.

[692] THE COURT: Sustained.

MR. BIRDSONG: Ask the jury be instructed to disregard.

THE COURT: Please disregard.

MR. BIRDSONG: Move for mistrial.

THE COURT: Denied.

Q. (By Mr. Fristoe) You said earlier, Deputy Lepicier, that you had been to the Brewer home on many occasions.

A. Not many. On several occasions.

Q. Okay. More than five?

A. I would say less than five.

Q. Less than five. Did you ever see Mrs. Brewer where she had been physically beaten?

A. I don't recall ever – there was never any severe bruising or swelling or, you know, busted lips or anything; some of the typical injuries you see in domestic violence. I never observed that on Mrs. Brewer.

Q. And the night of July the 14th, 1989, did you see any injuries to her that night?

A. No.

Q. Did she tell you she had been injured?

A. Her and her husband had been fighting.

Q. Was it verbal or physical? Did she let you know that?

[693] A. The furnishings in the room were pushed about. Things were on the floor. I assumed that there had been a scuffle.

Q. Well, we know there was a scuffle between Brent and the father, right?

A. Uh-huh.

Q. Okay. But you'd never seen any injuries to her that night or any other time that you had been there.

A. Not that I recall. None that would have been serious enough to stick in my mind.

Q. Okay. Did Mrs. Brewer – had she engaged in some alcoholic beverage consumption on some of those occasions that you went there?

A. I have never seen Mrs. Brewer drunk. And to recall whether I had smelled alcohol on her breath, I would be hard-pressed to say. I have never seen her intoxicated.

Q. But did you tell Mr. Birdsong earlier that Albert was not a verbally abusive drunk?

A. I can't say that. The times that I've been there, Albert has never given me any trouble. I remember one occasion, you know, taking him to jail, maybe more. He offered no resistance. He'd go on, take care of the paperwork, make bond, go on.

Q. Okay.

[694] MR. FRISTOE: I'll pass the witness, Your Honor.

RECROSS-EXAMINATION

BY MR. BIRDSONG:

Q. In your interview with Mrs. Brewer, you do know that Brent was trying to defend his mother, correct?

A. I don't know that for a fact, no, sir.

Q. Did you make any notes you can review from that?

A. Excuse me?

Q. Did you make any notes you can review about that?

A. No, sir.

MR. BIRDSONG: That's all I have, Judge.

MR. FRISTOE: I have nothing further, Your Honor. Your Honor, may this witness be excused?

MR. BIRDSONG: Yes, sir.

THE COURT: No objection. You are excused, Mr. Lepicier. Thank you.

* * *

DR. WALTER W. ECHMAN,

called as a witness by the State, having been first duly [695] sworn by the Court, testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. SHERROD:

Q. Would you state your full name for the Court, please?

A. My name is Walter W. Echman.

Q. And what is your occupation, please, sir?

A. I'm a physician.

Q. And what type of physician?

A. I practice neurosurgery.

Q. And in what area?

A. I'm in Tupelo, Mississippi?

Q. And are you licensed to practice medicine in that state?

A. Yes.

Q. And how long have you been so licensed?

A. Since 1985.

Q. Okay. Now, Doctor, if you would, I want to direct your attention back to July the 15th, 1989, and ask you if you had an occasion to treat a William A. Brewer.

A. Yes.

Q. And specifically at the time you did the treatment, where was Mr. Brewer?

A. I was seeing him initially in the emergency room [696] at North Mississippi Medical Center in Tupelo, Mississippi.

Q. And as part of your examination of that patient, did you obtain a history of the incident he was placed in the hospital for?

A. Yes, sir.

Q. And briefly tell us what the circumstances were relating to injuries he received.

MR. BIRDSONG: We object to any hearsay testimony.

THE COURT: Overruled.

A. I'm reading from my admission history and physical dated July 15th, 1989, as follows: Mr. Brewer is a 40-year-old man. Apparently has had a problem in the past where he has been violent toward his wife and has beaten her up pretty badly a couple of times. The son has witnessed this and then sometime in the evening of July 14th, this patient began to be rather threatening towards his wife and the son decided to solve the problem by beating his father rather sadly with a stick, which was reportedly a broom handle.

The patient was transferred here, then, with a laceration and possible fractures about his nose and face and with a left-sided skull fracture. And there's just other information that he had had a previous heart attack [697] and no other underlying medical problems.

Q. Okay. And, Doctor, if you would, describe the specific injuries that you treated Mr. Brewer for.

A. Okay. On my examination, he showed findings of scattered small bruises around the left chest and shoulder area and down around the abdomen. He had two small lacerations of the left side of his scalp, which had been sutured. He had a large laceration wrapping around the base and right side of his nose, which had not been repaired.

He had quite a lot of blood coming from his nose. He had a little ecchymosis, which is bruising or discoloration, and swelling around the right eyelid area. His neurologic exam showed that e [sic] was reasonable [sic] alert, although he was varying a little bit at time in his level of consciousness.

He did at some times initiate voluntary movements and said occasional words. He had very limited speech. His speech tended to be repetitious. He seemed to have a little weakness of the right side of his face.

He seemed to have a little slowness of movements of his right side compared to his left side. And those are basically the abnormal findings. The rest of his exam was basically normal.

Q. Okay. And did you, in fact, have to treat him [698] for damage that he received to his brain?

A. I – at that time, he was – that same – I guess of the early morning hours, probably, I don't have the exact time on that, he was taken to he [sic] operating room, and had surgery for elevation of a compound depressed skull fracture in the left frontal temporal area, which is approximately this part of the skull, and at that time had

cleaning up or debridement of laceration of the brain and repair of the dura, which is a membrane which lines the brain.

Q. Do your records show that he had to have some other additional procedure performed on him also at a later date?

A. Well, after I completed the procedure that I did, another surgeon came in and carried out an exploration of the nose and did repair of those areas, both of the skin and I think fractures, or at least evaluated the fractures.

Q. And did your examination of that patient show that there was a tear into the brain due to the injuries?

MR. BIRDSONG: Judge, this is leading, and I object.

THE COURT: Overruled.

A. He had a laceration of the dura which was about a one centimeter laceration, which is a little less than [699] half an inch. And he had a tear into the brain with a few vessels, small vessels that were protruding out and happened to be caught in this edge of bone that was depressed.

Q. Okay. Did you also perform a CAT scan upon that individual?

A. I'm going to look for – I'm pretty certain we did, but I would have to look for the report here.

Q. Okay.

A. Yes, he had – he had actually two CAT scans or CT scans; one was July 15th of 1989, which showed this

depressed skull fracture, and he had findings of multiple facial fractures.

Q. Did you also – following surgery, did you have the opportunity to examine him for a number of days or during a period of time after the actual surgery was performed?

A. Yes.

Q. And how long was he in the hospital? Do your records reflect that?

A. Yes. He was discharged on July 27th, 1989.

Q. Okay. And just before his discharge, did you examine him at that time?

A. Well, I saw him throughout the time in the hospital, and basically I observed him during that time. [700] I didn't do a more detailed exam, probably at the time of discharge, but observed him during the time he was in the hospital.

Q. As a result of the injuries, before his release, did you notice any kind of muscle weakness to the right side of his body?

A. Yes. I think the records indicated that e [sic] had a little bit of weakness and a little bit of persisting difficulty with his feet for a period of time, I think that even continued as an outpatient – on his outpatient follow-up for a short time.

He did – my notes say his neurologic progress came along very nicely with gradual improvement of right-sided motor function and slow gradual improvement of his

speech. So these functions were all improving as he was observed in the hospital.

Q. And the last time you would have observed him should have been July the 27th, 1989; would that be correct, Doctor?

A. Well, no, that's correct for the hospital, but I saw him in the office on two occasions following that.

Q. And when was the last time that you examined that particular patient have been?

A. I saw him on October 11th, 1989.

Q. And do your notes reflect that he was suffering [701] from any kind of injuries as a result or damage as a result of his previous injuries at that time?

A. Okay. He came back a little earlier than his scheduled visit because he wanted a slip to return to work at that point. My note says he was doing well clinically. He has good use of his right foot, no problem with his right arm. His speech is much better. Those were basically the findings I examined.

Q. Okay.

MR. SHERROD: Doctor, I thank you. I pass the witness.

MR. BIRDSONG: May I be furnished a copy of this?

MR. FRISTOE: I don't have his records.

MR. BIRDSONG: Judge, could I have a copy of those to review the notes he reviewed before?

MR. SHERROD: Your Honor, with he [sic] understanding that if he needs a copy of any of that, we would be happy to get a copy.

THE WITNESS: You can have this.

MR. SHERROD: Will that be okay?

MR. BIRDSONG: Thank you, sir.

[702] CROSS-EXAMINATION

BY MR. BIRDSONG:

Q. Dr. Echman, you had a chance to see a medical history of this patient of yours, correct?

A. Well, you mean before –

Q. Yeah, of any prior injuries he might ave [sic] had.

A. No.

Q. You never did?

A. All I have is what's – that's my history. Well, the first – I can show you – if I can show you on the document, I'll show you what is my history.

Q. You don't have to testify about it. Just show me where it is.

A. Okay. These are follow – up notes. This is the front sheet from the hospital chart. That's the discharge summary, where he was discharged, and those are the notes, including diagnosis. This is my history when I first saw him.

Q. You got this verbally?

A. That is my history. Well, I got it from somebody, and I can't tell you exactly how I got it, but that is – you know, possibly from several people, but that's oftentimes how things occur in the emergency room. You get little bits of information from several people, usually.

[703] Q. I've got a couple of questions I want to ask you about your report here. Before I get into that, though, what I want to make sure is that I understand that you do not have any other information from other doctors that have treated Mr. Brewer before; is that correct?

A. That's correct.

Q. You did not know he had prior head injuries?

A. This patient?

Q. This patient.

A. William Brewer. No.

Q. You did not know he had prior leg injuries?

A. No, unless its written there in that –

Q. Okay.

A. – bit of information.

Q. You have a note in here, a follow-up deal on July 26th, where the patient related to you that he wanted to get out and commit a murder. Do you remember that note?

A. Could I see it? Because what you have may not be on my information.

Q. This part right here.

A. These are records from the hospital, and there's a –

Q. What I would like to be able to do is ask you questions about those notes. Is that your note?

[704] A. No, that's not mine.

Q. Let me –

A. Let me talk to you all so you'll know that this is. There's also a handwritten note in here which is almost illegible by – this is a psychiatrist that works in Tupelo.

Q. Let me ask you about these, and you can try to help me out. Okay? Dr. Echman, we're looking at a report from attending physicians, stated W. Echman, correct?

A. Well, that's –

Q. Yes or no.

A. Well, that's not quite the way it's written. That form, it says "from attending physician." What it means it [sic] that's who the consult was requested form [sic]. The actual –

Q. Okay. Let me ask you this.

A. – consultation was provided by Dr. Golf.

Q. On 7-26-89.

A. Right.

Q. And these records are what you read prior to testifying today, correct? Yes or no. Did you read any of this?

A. I don't think so. no. Well, I mean, I've seen bits of that. I haven't read it in detail.

Q. Well, let me ask you this. Does this say right [705] here –

MR. SHERROD: Now, Your Honor, if I may, Mr. Birdsong is trying to get in inadmissible evidence by asking this man to read a record he didn't make an entry into, we don't know who made the statement, and now Mr. Birdsong wants to ask him a question in the form of a statement to this jury. We would object to the statement – or to the question and the statement.

THE COURT: Sustained.

MR. BIRDSONG: No questions, Judge.

MR. SHERROD: Your Honor, may this witness be released. He's got to catch a plane.

THE COURT: Any objection?

MR. BIRDSONG: No.

THE COURT: You may be excused.

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[755] CHINA LONG,

called as a witness by the Defendant, having been first duly sworn by the Court, testified upon her oath as follows:

DIRECT EXAMINATION

BY MR. DAFFERN:

Q. Would you state your name, please, Your Honor?

A. My name is China Long.

Q. And are you Judge China Long?

A. I'm a Justice of the Peace, yes.

Q. And where is that, please, ma'am?

A. In Big Spring, which is Howard County. I'm Justice of the Peace of Howard County.

Q. And how long have you been Justice of the Peace [756] there?

A. For six year. I was elected for a term beginning in 1985.

Q. Okay. Judge, I want to show you a document that has been marked as Defendant's Exhibit No. 5 and ask if you would look through that, please.

A. (Witness complies.)

Q. Have you had occasion to go through what has been marked Defendant's No. 5, Your Honor?

A. Yes, I have.

Q. Okay. Are you familiar with that document?

A. Yes. I have seen that document – this particular document before, yes.

Q. Okay. Are you the China Long that is listed in that document as justice of the Peace, Precinct 1, Place 1, in Howard County?

A. Yes.

Q. Okay. Do you know a Brent Ray Brewer?

A. I have had occasion to meet him, yes.

Q. Okay. Do you see him in the courtroom today, Judge?

A. Yes, I do.

Q. Would you point him out, please, for the jury?

A. He's the individual in the dark suit not wearing glasses.

[757] Q. Okay. Did you have occasion, Judge – was he the Brent Ray Brewer that Defendant's Exhibit No. 5 refers to?

A. Yes, sir. He looked a little bit different at the time that I saw him.

Q. All right. Let me – Judge, I show you what's in evidence and marked as State's Exhibit No. 104. Would you look at that document, please? Have you had a chance to see that?

A. Yes, I have.

Q. Can you identify the person in that document, Judge?

A. Yes.

Q. Who is that, please?

A. That is Brent Brewer.

Q. Does he resemble the Brent Brewer you knew more in this picture right here?

A. Yes.

Q. Okay.

MR. DAFFERN: We will tender into evidence, Judge, what's been marked as Defendant's No. 5 at this time.

MR. SHERROD: We don't have any objection, Your Honor.

THE COURT: Defendant's Exhibit 5 is [758] admitted.

MR. DAFFERN: Thank you.

Q. (By Mr. Daffern) Judge, I would ask you to go over, if you would, please, other than the first page of this document. Do you know a Margaret Ray?

A. Yes. Margaret Ray is the County Clerk in Howard County.

Q. Okay. Would you go over that document and just briefly explain what each page of that document is for the jury, please, Your Honor.

A. The first page here is an Application for a Court Ordered Mental Health Services on Brent Ray Brewer. This is the beginning of paperwork to put this man in the Big Spring State Hospital mental facility for evaluation.

This is against his will. It is a Court order. We must notify the individual that e [sic] is entitled to have a

hearing within 72 hours after he is committed under a Court order. He was notified.

There is also an Order of Probable Cause Hearing saying that he's going to have his 72-hour hearing. And I signed that piece of paper.

There is a Physician's Certificate of Medical Examination for Mental Illness indicating that there was an examining physician who did examine Mr. Brewer.

And there is an order that I signed after [759] talking with him, after reviewing the – whatever evidence that Big Spring State Hospital people were able to bring to the hearing to indicate that he did need to have further hospitalization at the Big Spring State Hospital.

And then there is an indication here that he did sign. After the hearing with me – I ordered that he be kept at the Big Spring State Hospital for up to 14 days.

After he had the hearing with me for that 14 days, he did sign voluntary papers stating that he had signed a request for voluntary admission.

And then, let's see. There is an order signed here by the Howard County Judge in that Mr. Jack Dempsey had come in and asked to see these records. Is that what you wanted me to say –

Q. Yes.

A. – about this?

Q. That's fine. Thank you very much, Your Honor. We would pass the witness.

CROSS-EXAMINATION

BY MR. SHERROD:

Q. Ma'am, just a couple of questions. First of all, for a person to be committed on a voluntary commitment – I believe that's what you said.

A. Yes.

[760] Q. What is involved in that?

A. Well, he just goes to the people at the Big Spring State Hospital and requests that he be committed on a voluntary basis.

Q. Okay. And is that kind of the procedure that was followed in this case?

A. No. He was committed the first time on a Court order.

Q. What happened in a Court-ordered hearing?

A. The person is detained, based on an application from a reputable person. For various and sundry reasons, he's detained, he's taken to the Big Spring State Hospital against his will, and he is examined there by a physician, psychiatric people, case workers.

Q. And if I wanted to have this little lady here committed down in your county, what would I have to do to have her committed?

A. You would come into the – generally, these are handled through our county attorney's office, come in and make a sworn statement that you feel that this person is a danger to himself or others.

Q. And if I just swear out that affidavit, she's gone; is that right?

A. Well, there is a requirement for a physician's examination of that person.

[761] Q. And usually, what does that physician base his opinion on?

A. I don't know. I'm not that physician.

Q. Do you think he goes into the background of the individual or just talks to the individual himself?

A. I'm not sure. I really can't answer that.

Q. What usually happens in your county?

A. What usually happens in my county is that a person who comes in and is a valid – I'm sure there are safeguards as far as just someone jumping up and having someone ordered committed.

If it sounds like a valid request and then a physician's examination – I don't know what that physician exactly does. But he does see the individual.

Q. Okay. And could that be for drug use?

A. Possibly so, yes.

Q. Alcoholism?

A. Yes.

Q. Suicide?

A. Yes, definitely.

Q. If this little girl here told me one time that she was thinking of suicide, would that be enough to – off she goes?

A. No.

Q. Okay. What would be the problem?

[762] A. I think there would have to be a serious – well, it would be considered a serious threat of suicide.

Q. And what constitutes a serious threat?

A. For many people, it's just the fact that this person has said that he will commit suicide and has done something to indicate that he would do it, perhaps a gesture, perhaps a note, perhaps an attempt.

Q. Okay. So, if this lady right here told me she was going to commit suicide and happened to write it down, off she goes?

A. Possibly.

Q. So that note, then, can make a difference; is that correct?

A. Yes, I think it could. I think it would add evidence.

Q. And again, you don't have any idea whether this is something that there's a legal basis for, if a person agrees to it; is that correct?

A. Well, if a person agrees to it, I don't see that person generally.

Q. Right. In other words, if he just says, yes, and 30 day or 20 days down here might do me some good, then there's no contested issue on that?

A. I don't see people that way, no. I see people who have been admitted against their will.

[763] Q. Okay. And, of course, you didn't hear any evidence to speak of in this case?

A. The only evidence I heard was that the man had made a suicide – a suicide note to his family. His family was concerned about his mental state.

And he could possibly be – after hearing from the person's social worker, I decided that he could be a threat to himself in this case because of the suicide.

Q. Was he working at that time?

A. I don't think so.

Q. Would that have been important to you?

A. I generally do ask people if they do have a job, and what they are doing. On a suicide attempt, I take that seriously.

Q. And do you remember whether this Defendant was working at that time?

A. No, I don't.

Q. Was he living with his folks?

A. As I understand, it was members of his family who had asked for him to be committed.

Q. But do you know whether he was living at home or living with someone else?

A. No. No, I don't.

Q. Okay. And as far as that goes, you don't know who wrote the suicide note, do you?

[764] A. No.

Q. Okay. Did you make any inquiry as to whether a member of the family may have signed the note?

A. The suicide note?

Q. Uh-huh.

A. I don't recall.

Q. In other words, if someone was having a pretty bad drug problem, and you had basically told them, well, we have to have something to support this accusation, I guess like you said. We just don't what [sic] you to come in and tell me that he said he was going to kill himself, and off he goes again.

But you don't really inquire as to whether or not that's his note. You didn't in this case?

A. No.

Q. Okay. Do you remember talking to him that much?

A. I don't remember that much about the conversation.

Q. And specifically when would that have been?

A. In January of 1990.

Q. Okay. And you don't know anything about what happened after that period of time.

A. No, I don't.

Q. Just that he did agree to go?

A. Just that – I, in fact, said, "I think you [765] should stay at the Big Spring State Hospital for up to 14 days," and I signed the order.

Q. Okay.

A. Many times, the hospital will release people during that 14 – day period. Or if they sign a voluntary commitment, then we don't see them anymore, and I don't see them anymore, period. The County Judge does any other court proceedings that are held.

Q. This particular case was a voluntary commitment, basically?

A. I understood that. After I saw him, he did say that he wanted to stay and sign the voluntary commitment.

Q. Okay. You weren't concerned that he didn't know what he was doing at the time he agree [sic] do [sic] stay there, then?

A. I had seen him at the 72-hour probable cause hearing, and based on what I heard, I felt he needed to stay for up to two more weeks.

Q. I guess my point is, you felt that he was aware of what was going on and competent enough to make a decision to waive any hearings?

A. Well, the waiving of the hearing came after I saw him.

Q. Okay. You didn't have any concern about him volunteering to go, then?

[766] A. He did not volunteer in my presence. At the time I saw him, I thought that I was signing an order, and I did sign an order saying that he would stay for up to 14 days. Any further Court order is then signed by the County Judge in our county.

Q. Okay. All right, ma'am. I thank you.

MR. SHERROD: That's all I have, Your Honor.

MR. DAFFERN: I have no further questions for the Judge. May she be excused?

THE COURT: Thank you. You may step down. There is no objection. You may be excused.

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[768] ALBERT BREWER,

called as a witness by the Defendant, having been first duly sworn by the Court, testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. BIRDSONG:

Q. Albert, would you state your full name for the jury, please?

A. William Albert Brewer.

Q. Do you know Brent Brewer?

A. Yes, sir.

Q. How do you know him?

A. He's my son.

Q. Albert, I want to visit with you about Brent and the raising of him. Before I get into that, though, I want to talk with you about where you live. Where do you live right now?

A. Hamilton, Mississippi.

Q. How long have you lived there?

A. Five, six years.

[769] Q. Are you a working man?

A. Yes, sir.

Q. Where do you work?

A. I work for Preston *Dopp* Truck Company. I drive a truck.

Q. Are you married?

A. Yes, sir.

Q. Who are you married to?

A. Karon Brewer.

Q. Is that Brent's mom?

A. Yes, sir.

Q. Have you been in the military, sir?

A. Yes, sir. Twelve years.

Q. Did you serve in Vietnam?

A. Yes, sir. I served three months.

Q. Did you see combat there?

A. Yes, sir.

Q. Give the jury a brief rundown of what you had to do in Vietnam.

A. I was in the long range alert, which is better known as suicide squad. And I've been shot twice, and we worked in six-men teams, and I was a team leader. And my team had the highest body count in the battalion of the 101st Airborne. I was over there a long time.

Q. Were you decorated?

[770] A. Yes, sir. About every metal you can get, but all of them won't get me cup of coffee, you know. I've got a bronze star with a clover leaf, a silver star, stuff like that.

Q. How old were you when you got married?

A. I'd just got back from Nam after one year there, and I was 19 when I got back. I got married the following month. I turned 20 on the 7th of October, got married on the 24th of October. I was 20.

Q. When was Brent born?

A. Well, we had split up at the time we found out she was pregnant.

Q. You and Karon?

A. Yes, sir.

Q. Were you there when he was born?

A. No, sir, I was in Germany.

Q. When was the first time you were able to see your son, Brent Brewer?

A. About five months old.

Q. When he was five months old?

A. Yes, sir.

Q. How long did you get to see him?

A. Well, I was on a 30-day leave, and they extended it to another 30 days. And I went on to Vietnam for the second time.

[771] Q. How long were you in Vietnam on this tour?

A. Twelve months, plus six.

Q. Is that when you got wounded?

A. I was wounded the first time and the second time. I got shot through the legs and the head.

Q. In the head?

A. Yes, sir.

Q. Albert, how old was Brent when you saw him the second time?

A. Briefly, about five years old, four and a half.

Q. How long did you get to see him that time?

A. My mother died, and I was home on leave, and I run out there for about two days.

Q. At this time, were you divorced from Karon Brewer?

A. Yes, sir.

Q. She was remarried by that time?

A. Yes, sir.

Q. Did you get to see Brent Brewer any other time after this – after you saw him when he was five years old at the funeral of your mother?

A. No. He wasn't at the funeral. We done buried my mother, and I come out here to see him. But the next time I saw him, he was 15 years old.

Q. Had you kept in contact with him at all during [772] that time?

A. No, sir.

Q. What were you doing at the time when you saw him when he was 15 years old?

A. I was driving a truck, and I came through Dallas, Cedar Hill.

Q. How did you know where he lived?

A. Well, I have talked to his mother during the years, but I didn't see him – Brent, you know, in that time.

Q. When you saw him at that time, tell the jury about how you arranged to meet him and what happened.

A. Well, I stopped below their house where they were living in Cedar Hill about 15 miles, and I called Karon and told her where I was at, at the – like a Junior Food Mart or a store that had a pull-off.

And she said, "I'll bring him down to meet you." I think a friend of his brought him down to meet me, put

him out, we got in the truck. And from right there – I bought some beer and he pulled out some grass out of his pocket, and my first meeting, I wasn't going to just tell him, "put it up," you know, or be a hard daddy to him.

I was just seeing how he was raised and what he was used to. And I watched him smoke that joint and it told me the way he smoked it, he'd been doing it a long [773] time. It wasn't a first time thing. And we just talked and got messed up together.

Q. Now, Albert, did he drink beer with you, too?

A. Yes, sir.

Q. And that was the beer you bought?

A. Yes, sir.

Q. Do you have a substance abuse problem?

A. Not now, but I used to, yes. In Vietnam, I sold it and my habit – I went to the hospital to get off of it. My habit, they said, was equivalent to $1550-a-day habit in America.

And I went in the hospital and got off of it. But at the time, see, I got off of one crutch onto another. And I got off the dope or heroin and I switched to booze. And that's the same poison, you know.

And I used to buy half a gallon of vodka and drink it out of the bottle, you know.

Q. Okay. Albert, did Brent have an occasion to go live with you?

A. Yes, sir.

Q. When was this?

A. I don't know what years. And when me and Karon got married, we got together.

Q. Did he live with you before you and Karon got married?

[774] A. A short time, not long. He just stayed the summer, like.

Q. Where was this at?

A. Mississippi, Hamilton.

Q. All right. Did you have any other children that Brent had to meet?

A. Yes, sir, I did, one. My son, his half-brother.

Q. Okay. What's his name?

A. Israel Brewer.

Q. How did Brent and Israel get along?

A. Oh, outward, you know, they got along real good. But inward, I see the affection I showed my little son, it hurt Brent inside, but he didn't show it. But it was there, I could feel it.

And I felt bad, because I didn't show him – I wasn't around to show him the affection I showed my little son there.

And he resented that, and other than the resent, because it hurt, you know. And I saw that, and it was my fault, and I couldn't – I didn't know how to correct it.

Q. Okay. Were you drinking at this time?

A. Yes, sir.

Q. Did you have occasion to he pretty harsh with Brent and Israel?

A. Yes, sir.

[775] Q. Tell the jury what you did that was harsh.

A. I did what?

Q. Tell the jury what you did that was harsh with Brent.

A. Well, like I said, I was sergeant in the Army, and I was saddled with a 15-year-old kid, and I was used to having people do what I say do when I say do it. And I'm sure I threatened him like a military. I was hard on him, you know, and if he didn't do it, I threatened him with physical.

Q. Did you get physically violent with him?

A. Yes, sir, I did.

Q. At some point in time, you and Karon got back together, correct?

A. Yes, sir.

Q. And did she move back to Mississippi with you?

A. Yes, sir.

Q. Okay. And that was to Hamilton?

A. Yes, sir.

Q. Tell the jury how big a town Hamilton is.

A. We don't have a red light. We've just got one service station, a little grocery store, and a little eating place, and at the most, 300 people; you know, a small place, real small.

Q. When you and Karon got back together, how would [776] you describe your relationship to Brent's mother?

A. Well, good – you know, when it's good, it's good, But I've got a lot of problems, and when I was violent or things didn't go my way, I get violent, you know.

Q. Did you beat Karon up?

A. Yes, sir.

Q. Did she have to call the police on you sometimes?

A. Yes, sir.

Q. Was Brent around when that happened?

A. Yes, sir,

Q. Did you and Brent have fights about that?

A. Yes, sir. Well, it wasn't me and Brent having fights. Me and her had fights, and he loved both of us, and he was drawn two different directions, and he got between.

But then, I just got mad at him, too, you know, and that's what started it.

Q. Okay. Tell the jury what you told Brent when he would get between the two of you.

A. "If your ever draw your hand back, you'd better kill me, because I'll kill you."

Q. You told your son that?

A. Yes, sir.

[777] Q. Do you know Deputy Lepicier?

A. Yes, sir. I know him, but not personally, but I know him.

Q. Has he taken you to jail before?

A. Yes, sir.

Q. Has he come out and talked to you and arrested you after you hit Brent before?

A. Yes, sir.

Q. There was an occasion – did you see Deputy Lepicier here today?

A. Yes, sir. When I walked in, he was sitting in the break room, but I just walked in and walked back out and went to the latrine.

Q. Was there ever an occasion when you had to go to the hospital because you were hit by Brent?'

A. Yes, but I deserved it.

Q. Tell the jury what happened that night.

A. Well, it started off, my wife – I had a check account and put my wife on it. She took my name off of it. I come in there, and I got her check, and Brent went with me around, and I was talking to Brent this whole time that – what I ought to do to her, you know, physically.

And I got back and I started a verbal argument and the more I argued, the madder I got – became. And I picked up a chair and threw it at her.

[778] And Brent hollered at me to stop, but I just told him, you'd better get your a-s-s out the door, or I'll do it to you, too.

And I heard him say something else, like, you want me to stop, but I went towards her, went towards her and that's when he hit me. I had it coming, you know.

Q. Albert, were you in the hospital for a while?

A. Yes, sir.

Q. Do you remember telling one of your doctors that you were going to commit murder to the person that beat you up?

A. Yes, sir.

Q. Albert, have you been diagnosed with post-traumatic stress syndrome?

A. Yes, sir. I was arrested at one time other than that, and it took two police officers to bring me in. And then only when I wanted to, and they knew it.

And I had a Buck knife on my belt, and he wanted to take it off, and I just back-handed him onto the ground. And in Mississippi, its automatic two years if you strike a cop. And they said I do the two years or go to the crazy house, you know. I don't know what you call it.

I just volunteered to go down there and be checked out by a psych. They put me through everything, [779] checked me for a tumor and he said I had that post –

anyway, deep, deep depression due to Vietnam. And he didn't want to release me to go back home unless I checked in with a psychiatrist up home and followed through on what he had diagnosed, because he said he didn't want to be responsible if I went back up there and killed somebody.

I went back up there and tried to go through with that psych, and that psych just wanted to put me in AA. And I asked him did he think by putting me in AA, I would become out from under him totally. So, I did that. I didn't go to AA and I didn't follow through with the treatment.

Q. Do you know – well, you didn't know how Brent's stepfather treated him, because you didn't see him, right?

A. I didn't know, but I just heard he ignored him, you know. But I didn't know.

MR. BIRDSONG: Judge, I'll pass the witness"

CROSS-EXAMINATION

BY MR. SHERROD:

Q. Just a couple of questions, please, sir. How many times have you seen the Defendant since he's been in jail?

[780] A. Since he's been in jail out here?

Q. Yeah.

A. I think twice.

Q. Okay. And over what period of time?

A. About a year.

Q. Okay. You actually came back and went out and talked to some people about the facts of this case, didn't you?

A. When I come out and visited him before?

Q. Yeah.

A. We were trying to find out the truth, because we didn't believe he could do this.

Q. Okay. Let me ask you: You indicated that he loved his mother; is that correct?

A. I still do, yes, sir.

Q. And loved you; is that true?

A. Yes, sir.

Q. But he almost beat you to death?

A. Well, he loves his mother, too.

Q. But he almost beat you to death.

A. Well, I told him if he ever draw a hand back at me, he'd better kill me. He knows – I've had four and a half years karate. He knows what I've been through, and he believed me. And I don't blame him for that, no, sir.

Q. Did you ever want to file charges on him?

[781] A. No, sir.

Q. You never talked to the officer later or sometime –

A. The officer come out to my house, wanting to file charges on him. I said no. They wanted me to do it, they did. But I wouldn't.

Q. Did you go back to them later and ask to file charges?

A. No, sir.

Q. You never talked to the officer about wanting to file charges where he instructed you that the District Attorney would not file, because it had been too long?

A. Oh, no, sir. He came out to the house, two car loads of them, and come into my living room and sat down and tried to get me to do it. He told me, I guarantee you he'll get two years.

I wish I had of, because he wouldn't be in this shape now, but I didn't never want to press charges.

Q. A lot of violence with him when he was beating – a lot of violence with him when he was beating you?

A. When he was beating me?

Q. Yeah.

A. How violent can you get when you are beating somebody, you know?

Q. That's what I want to know. What injuries did [782] you have?

A. He hit me in the head, and it just knocked me out right there, but –

Q. Did it break your nose?

A. – I got shot in the head right here. They told me if I ever get hit in the head, it could kill me.

Q. Did you tell him that?

A. No, I didn't,

Q. He didn't know that?

A. He knew I was shot in the head. I ain't going to walk around and tell anybody I might die if I get hit in the head. I wouldn't get a job.

Q. You had heart surgery prior to that time?

A. No, sir. I had a heart attack.

Q. Okay, You had a heart attack prior to he time that he hit you in the head?

A. Yes, sir.

Q. Did he hit you just one time?

A. That – more than that, but that's the one I remember, that's all. I don't remember hitting, no.

Q. In other words, after the first time he hit you, he knocked you unconscious and then he beat you and beat you and beat you after that; is that correct?

A. I don't know. I don't remember it. But I know I didn't fall down. I was on my knees, but I didn't [783] fall. He was trying to kick me off my feet, down, but he didn't.

Q. Do you remember all of it, sir, or did the first – did the first hit knock you unconscious, as you said?

A. I don't remember. After the first lick, I went to my knees, then I started to remember. I was on my knees, and Karon was over there wiping blood, and I saw Brent standing there with tears in his eyes.

Q. Did you have other wounds on you?

A. Just right here and here.

Q. Your jaw was broken?

A. They said it was.

Q. Your skull –

A. But they said, too, that when they got in there, they found another bone that had been broke for years from military. They had – they said they had to put it back together. That way they had to wire my jaw, too, because that bone never healed all these years.

Q. One of the bones in your skull when Brent hit you went into your brain, didn't it?

A. Over here.

Q. Uh-huh.

A. I don't know.

Q. Did you have any paralysis after those injuries?

[784] A. No more than expected. It come back, you know.

Q. When did he leave the house?

A. While I was in the hospital.

Q. And was he there when you got out?

A. No, sir.

Q. Did you forgive him?

A. Yes, sir, totally.

Q. But he didn't want to be around the house?

A. Well, like I said before, he knew what I'd said, and he was scared that I would hold something against him when I got out.

Q. Was he afraid that you would kill his mother?

A. Maybe he or – his mother or him. I don't know which – I can't think for him, but I know he was scared for himself. He wanted to get out of that, because he knew me.

Q. His mother was still living with you, correct?

A. Right.

Q. She stayed with you after that, correct?

A. A short time, yes.

Q. After that injury, when was the next time you saw him?

A. I talked to him on the phone.

Q. When?

A. When he got in the halfway house. I found out [785] and got in touch with him.

Q. You talked to him one time?

A. No, three or four times.

Q. When was the next time you saw him?

A. Even Kristie talked to me in the phone.

Q. When was the next time you saw him?

A. Next time? He was in jail here.

Q. Okay.

A. Can I add something, though?

Q. If I may, sir, let me ask you this: You indicated he was in a halfway house?

A. Well, I guess that's what it is.

Q. Is that in Big Spring?

A. Right, yes, sir.

Q. For narcotics abuse?

A. Yes, sir. As far as I know. I don't know the place, but that's what I heard he was in there for. He turned himself in for that.

Q. And is that where he met Kristie Nystrom?

A. Yes, sir. As far as I know, yes. And I would talk to him, and he said, "I've got somebody I want you to say hello to, a girl." And I said, "Brent, I don't know her." And he said he insisted that I say hello, but she couldn't – too, the phone and I said hello, she just said hello and goodbye and that's all I said to her.

[786] Q. And he was being held for counseling for drug abuse at that time?

A. Well, he turned himself in. I guess he was held. May I add something?

Q. Sure.

A. After what happened, I know for a fact that what Brent did to me, which I deserved, and I probably deserved killing, but it tore him up mentally, you know. How can a kid do that to his daddy and walk around and not be

tore up inside. I know he was. I could tell the way he talked. He apologized over and over.

Q. The next time you saw him, he was in jail.

A. Yes, sir.

Q. And that was on the murder charge?

A. Yes, sir.

Q. Brent have a lot of self-pity for himself?

A. I don't think it's self-pity. He got a raw deal, and I started the whole ball rolling.

Q. Would it be your opinion he's always had raw deals?

A. He didn't have a daddy.

Q. So, if he goes out and commits murder or whatever he does, he's not responsible for it for the rest of his life?

A. No, I'm not saying that. No.

[767] Q. I mean that justified to everyone, if you have a bad daddy, why a person would stab an individual three times in the neck for $140?

A. I wouldn't say – he's feeling sorry for himself, though, this ain't – my mother and daddy separated when I was three. I didn't kill nobody on the street, you know.

Q. Let me ask you this: A person sits in the courtroom and hears about a man begging for his life as he stabs him in the throat, "Boy, don't kill, me. Boy, don't kill me," and the only time you hear any sniffles or any cries is

when his dad is on the stand testifying for him. What does that show you?

A. I don't know that he said that. I wasn't there.

Q. Did you beat your wife real bad when you were living with her?

A. At times, yes, sir.

Q. On this particular occasion when he almost killed you, or put a bone fragment into your brain, was she bloody, have a busted lip?

A. I don't remember. I was throwing chairs in a rage. I don't – when I do that, I don't know what –

Q. Did you hit her?

A. I imagine I did, because she ducked one time, and – I threw two chairs, I know.

[788] Q. Was she bruised?

A. I started around the table towards her. That's all I remember.

Q. Were you going to kill her?

A. I didn't intend to kill her, but to get my hands on her, I don't know.

Q. Had you tried to kill her before?

A. No, I ain't tried to kill her. Beat her, yes, maybe.

Q. Put her in the hospital before?

A. No, sir.

Q. Have you had police officers out where they could see swollen eyes, broken noses, anything like that before?

A. Yes, sir.

Q. Which officers?

A. Well, it was a long time ago. That was – I don't remember the names. It was back in the sixties.

Q. Do you have a problem controlling your temper, too?

A. I used to.

Q. But no more?

A. No, sir.

MR. SHERROD: I'll pass the witness. Thank you, Mr. Brewer.

[789] MR. BIRDSONG: Nothing further, Your Honor.

THE COURT: You may step down, Mr. Brewer. Thank you.

* * *

[817] KARON BREWER,

called as a witness by the Defendant, having been first duly sworn by the Court, testified upon her oath as follows:

DIRECT EXAMINATION

Q. State your name, please, ma'am.

A. Karon Brewer.

Q. Karon, do you know Brent Brewer?

A. Yes, I do.

Q. How do you know him?

A. He's my son.

Q. Karon, do you understand what the jury has found Brent guilty of as of yesterday?

A. Yes.

Q. I want to visit with you about Brent, him growing up with you. I want to ask you first about his father, Albert Brewer.

How long was it before Brent and Albert actually had a father-son relationship?

A. Not until he was 15.

[818] Q. Where were you living, ma'am?

A. I was living in Cedar Hill, Texas.

Q. Did – were you married to Albert at that time?

A. We lived together for a few months and decided we could work it out and be a family.

Q. You and Albert had been married earlier and divorced earlier, correct?

A. That's right.

Q. And after you divorced Albert the first time, you married another man?

A. I'm sorry. What?

Q. After you divorced Albert the first time, you married somebody else, correct?

A. Yes, I did.

Q. That was Don Bartlett?

A. Right, when Brent was two.

Q. Okay. Albert and you had some problems; is that correct?

A. Yes.

Q. Did Brent see you and Albert display these problems?

A. I'm afraid he did.

Q. And what were the problems that I'm talking about?

A. There were many. One was his jealousy of my [819] children. We had a good relationship. We talked and laughed and he seemed to feel he was excluded from that. And he would, like, punish me by being mean to my children.

Q. What would he do to your children?

A. He would talk with them one moment like he was a father. He would get mad, and wouldn't say anything, and we couldn't find out what was wrong.

And we – like, he would go out to work, and he would be happy. He'd come home mad, and we all just had to walk on pins and needles to keep from setting him off.

Q. What would he do when he got set off?

A. He would yell, he would throw things, he beat on me frequently.

Q. Did you ever see him beat on Brent?

A. He attacked my daughter verbally, but he never hit her. Yes, he has hit Brent numerous times.

Q. Did he ever hit him with objects?

A. Yes.

Q. What objects?

A. Once was the butt of a pistol. He was out in the back yard target practicing with a pistol, and he hit Brent in the head with the butt of the pistol. He has hit him with his fist, he has it him with a flashlight. He tried to hit him with a stick of firewood. When he went [820] outside to grab the firewood, I slammed the front door and locked it, and he smashed the glass out of the front door with the firewood. That was the night I had him arrested.

Q. Before you and Albert got back together, you had – Brent had a stepfather named Don; is that correct?

A. Right.

Q. How did Don treat Brent?

A. Right after we married, he treated him really well, and I thought he was going to be a good father. And then after he and I had a child, the older this child got, he ignored Brent, just like he wasn't there.

And he would take, like, our daughter, when she got to be two and three, four years old, he would take her to, like, a convenience store, buy her cokes and candy and tell her

to eat it up before she got back, and not bring him anything. And as he got older, he would see this.

Q. How did that affect him?

A. Well, it hurt his feelings. He came to me and he said, "Why didn't he bring me something?" I said, "I don't know. Let's go get you something, too." And I'd take him. And as my daughter got older, she saw what was happening, and when he would take her to the store, she always picked up Coke, candy, gum, whatever; she said, "I'm getting this for my Bubba."

Q. What is your daughter's name?

[821] A. Billie Ann Bartlett.

Q. Karon, how did Brent do in school?

A. He did real well until he got in the fifth grade, and he had to have back surgery. And I think that hurt him some. You know, that's a tender age to be different from anyone else.

But he was good in sports, he was on the championship football team, he played baseball, the championship on basketball, he was a starter player, very outgoing, very friends, and had lots of friends.

And I know he started – this was in junior high, and this is where some pot started coming in. And he started smoking pot.

Q. Did you catch him at it?

A. I caught him at it once when I picked him up at the skating rink, and I couldn't tell what it was for sure. And then when I realized what it was, he said he got it

from a boy there, that he said it was all over the skating rink. All the kids have it.

Q. Karon, do you know Amy Forrester or Amy LeMaster?

A. Yes, I do.

Q. How do you know her?

A. She was in our home numerous times. From my children going to school with her is how I met her.

[822] Q. And this is in what county?

A. Hamilton, Mississippi.

Q. And how big is Hamilton?

A. Oh, six, seven hundred people. Very small. It's scattered, it's rural.

Q. Were Brent and Amy boyfriend and girlfriend?

A. Yes.

Q. Did Brent and Amy break up while you lived there?

A. Yes, they did.

Q. Did you know Brent got punished for pushing her?

A. This was after they, had broken up. She had even been to our home on two occasions. One she brought her new boyfriend, who is now her husband, and tried to induce Brent to fight with this boy and Brent – I could hear them in the next room. I was watching TV.

And she was screaming and yelling at Brent. Curtis and Brent probably knew each other, didn't want to fight. And I don't know what she was all about that night, but she wanted these two boys to get in a fight over her.

I had had enough. I went and asked them to leave.

Q. Did you ever know that Amy had her arm paralyzed because of Brent?

[823] A. That is a bald-faced lie. That is a lie. Her arm was not paralyzed.

Q. It wasn't paralyzed for two months?

A. No, it was not, because she was working. How did she work? She's a waitress at a steakhouse.

Q. This was back in when they were in school together.

A. Right.

Q. She was working then, too?

A. She was working and going to school. I know Pam, the girl that Brent was talking to. I don't know if I can tell you what she told me about this incident.

Q. Let me – go ahead.

A. Pam came to our home and told us after she said that Amy was saying all of this. Pam worked with her at work. Pam got Amy this job, and they were friends at one time.

And she said the day this happened, she said, Brent had told her to go on. We were standing there talking at a locker, and she came up yelling at Brent, mad at him, and

we were just standing there talking, and Brent told her to go on, go on.

And then about the third time he told her to go only, she stepped between them and started screaming in his face, and he just shoved her with one hand, was all. [824] She said, "I believe she tripped over her own feet going backwards."

Q. Do you work now, ma'am?

A. Yes, I do.

Q. What do you do?

A. I'm a truck driver.

Q. Do you drive with Albert?

A. No. We have separate trucks.

Q. Okay. What were you doing when Brent was in school, what was your job?

A. In where, what city?

A. Cedar Hill?

A. I was assistant manager at Mervyn's department store.

Q. Did Brent help take care of his sister?

A. Oh, yes. From the time I went to work. She was 9 years old, and he was 13 when I went to work, and they would ride the bus home together. And he would always make sure she got in the house and got her after-school snack. They would call me at work. I knew when they got home.

Q. Did you have an occasion to see Brent and Kristie Nystrom together?

A. Yes, I did.

Q. On how many occasions?

[825] A. At least three.

Q. Where did you first see Brent and Kristie together?

A. This would be at Guy Blackwell's house in Amarillo.

Q. And this was after their release from Big Spring?

A. Yes. I did not want her to come down here. I did not know she was coming. And Guy had invited Brent to be his roommate, because I was gone three weeks at a time. And I said if that's satisfactory with Brent, okay.

Q. Had you visited with Brent while he was at the rehab?

A. In Big Spring?

Q. Yes.

A. I had spoken with him by phone. But the one day when I could get through, I was driving and it was a few minutes after visiting and they wouldn't let me visit. But I did talk to him numerous times by phone. I called him long distance with a calling card while I was out on the road.

Q. What was his – what were his plans upon release from Big Spring? Did he relate those to you?

A. Yeah, he did. When I found out that he had committed himself, and my mom told me that he wanted to [826] turn his life around, I called Brent, and I spoke with him. We spoke numerous times.

He was ready. He said, "I have to turn my life around. I have to get rid of these drugs, marijuana, crack, everything."

His plans were to go – to return to Abilene – when he turned himself in, he planned to return to Abilene to a halfway house. He had planned to counsel with other kids, to try to help other kids to get off of drugs, and this, in turn, with the counseling, would help him to stay away from the drugs.

It would mean a whole new set of friends. He understood that. I said, you cannot associate with your former friends. I know they are your best friends, you think, but they are not.

He even understood this. This was his plan,

Q. Did he do that when he got out?

A. No, he didn't. He started changing his tone as I spoke to him every few days. He had met someone, and wanted me to speak to her on the phone. I did. Kristie. He introduced me to her by phone, and I spoke with her on the phone.

Well, he started saying, "Well, I believe I want to go to a halfway house, maybe in Odessa or Midland." I said, "Why?" He said, "Well, I just think it [827] would just better just to get out of Abilene. That's what I was told."

Then he changed, and he wanted to come to Amarillo. I said, you know, I'm gone three weeks, in four days, gone three weeks. He said, this is fine, he could handle that. He'll go through a drug program here, like AA meetings, they have drug meetings. He'll go to those.

When he's ready, when he's strong enough, he'll go to work, he'll make new friends. This is a new start. I didn't know these other things.

Q. What changed, what happened?

A. Everything was Kristie. Everything was Kristie. And he was telling me she wants to come, too. I said, "Brent, I cannot support her. I cannot do this. I cannot support that kind of a lifestyle with you and this – and she's a woman 22 years old and you are a teenager. I can't support this."

Q. Do you think Kristie controlled Brent?

A. Yes. I didn't realize the extent until I arrived in Amarillo and met her.

Q. Ma'am, I thank you. That's all.

MR. BIRDSONG: Pass the witness.

CROSS-EXAMINATION

[828] *BY MR. SHERROD*:

Q. Just a few questions. Ma'am, first of all, when he got this great awakening that he was going to turn his life around, he had a job, I'm sure. Was he working?

A. He worked for Exxon.

Q. Okay. How long?

A. You've got to understand, I was on the truck, and he was at my mother's, and I can't give you an exact date or figure.

Q. Was that before he went to rehab?

A. Okay. I was going – okay, wait a minute. I was fixing to go to work in Amarillo, and I was living in Abilene, and my car, I had two flats on it, and I didn't have a spare and nothing was open. But I got to a pay phone, and my mother had to come pick me up in her car in Post, Texas.

Brent – this was his only way to work, was using my mother's car, but she had to come get me. I was stranded. He called and told them he was going to be late, but when he went in to work, he was fired.

Q. And that was before he went to the halfway house?

A. Yes.

Q. After he got out of the halfway house, did he [829] have a job?

A. After he came to Amarillo?

Q. Uh-huh.

A. Oh, no.

Q. Oh, no – I mean, did he ever work?

A. He tried to work. He didn't have a car, he didn't have transportation to do it.

Q. And he stayed in your apartment or your house while he was in Amarillo?

A. No, he stayed in Guy Blackwell's house.

Q. Okay. And then after he left Guy Blackwell's house, where did he go?

A. Guy Blackwell threw him out.

Q. Was he paying his rent?

A. I paid rent.

Q. So, you –

A. Brent in return helped Guy. I said I didn't think I was paying enough and Guy said, yes, you are, because Brent cleans my house. He has two children he sees every weekend.

He said, "Brent cleans my house from top to bottom, he does my laundry, he does painting on this house, he does yard work. Brent more than pays for staying here. And with what you give him for this his cigarettes and part of the utilities, that more makes for [830] anything. Brent helps me out. He keeps my house clean."

Q. You were buying cigarettes for him, too?

A. Well, sure, he's my son.

Q. He couldn't afford cigarettes?

A. He was not going to work as long as Kristie was there. Kristie would not work. She was too lazy.

Q. I thought she was a topless dancer at Cassidy's or Crystal Pistol or whatever.

A. Right. Because Guy had thrown them out. They had no other place to go.

Q. She was working –

A. Brent had a roofing job –

Q. She was working –

A. – and the boy was supposed to come pick him up, this friend that got him the job, and he never showed up to pick him up. He lost that job because he couldn't show up the first day. He had no transportation.

Q. Nothing this man has done in 21 years is his fault, is it, Mrs. Brewer?

A. Oh, we all have to assume responsibility for some of our actions.

Q. But the job, the fact that he couldn't work is because of a friend, or the fact that he couldn't get a job was because of Kristie. It's pretty nice just to lay around –

[831] A. He didn't have any transportation. I'd like to see you try to get a job with no friends in town and no transportation. You can't do it. I've been there.

Q. How did Kristie get this job that she had at the topless joint?

A. I have no idea.

Q. How did she get to work?

A. I have no idea. I know one thing. She begged rides from everybody.

Q. And, of course, when –

A. It was also not very far to work.

Q. And, of course, when this guy kicked Brent out of the house that he was living in free –

A. No, he didn't live there free. No, I didn't say that.

Q. How much –

A. I said Brent worked and cleaned this man's house, did his laundry, helped tend to his children. When he had to go to work – he was a mechanic at Builder's Transport – when he had to go to work on the weekend, Brent tended his two small children. Guy left them with Brent, in Brent's care. He fed them, bathed them, put them to bed, tended to them.

Q. Did you just tell us that he kicked him out?

A. Yes, he did. You've got to realize Guy [832] Blackwell is an alcoholic, too.

Q. Well, that's his fault again, then, correct?

A. No. I'm telling you – well, you don't want to listen to what I have to say.

Q. Well, let me ask you, did you have conversation with Amy Forrester today?

A. Yes, I did.

Q. What did you tell her?

A. I said, "You know what you said is a lie; you know it and I know it."

Q. That's all you said?

A. That's all I said to her. I said, "You have to live in Hamilton, and so do I."

Q. Did you go out there and tell her that you heard what she had said on the witness stand, and that she would pay for it?

A. I didn't tell her she would pay for it.

Q. Did you tell her –

A. I said, "I heard that you – what you testified, two months paralyzation (sic)," and that's not true at all. She wasn't off work that long.

Q. Can you answer the question I'm asking you, ma'am?

A. Make it straight.

Q. Did you tell the woman that you heard what she [833] said on the witness stand, and that she would pay for it?

A. No, I didn't say she would pay for it.

Q. Did you tell her –

A. I said, "I heard what you said, and you know it's a lie, and I know it's a lie."

Q. Did you tell her, ma'am, that, "You and I live in the same county, and you will pay"?

A. No, I didn't say "county." You've got that wrong.

Q. That wasn't what you said?

A. No, I did not say "county." I said, "You know you live in Hamilton and so do I. We have to live in the same town."

Q. What did you mean by that?

A. Well, she's going to have to face me, and she knows she's come up here and lied.

Q. What are you going to do to her when you face her?

A. What would I do to her?

Q. Did you slap her before? Have you ever slapped her?

A. When she started cussing me in my own home, and I asked her to leave repeatedly, and she would not leave, and she was cussing me –

Q. You slapped her.

[834] A. – in my own home?

Q. Did you slap her?

A. Yes, I certainly did. And I'll do it again if she comes to my house cussing me and won't leave when I ask her to.

Q. How old was she?

A. You don't know how many times I've had to run this girl off.

Q. How old was she?

A. I don't know how old she was.

Q. How come she kept coming back to the house?

A. She was sick.

Q. Or was it because –

A. She came to our house one morning at 2:00 o'clock in the morning drunk, banging on his window.

Q. Again, that's her fault and not his, correct?

A. She didn't – she was not invited. He did not invite her. We didn't have a phone at that time. She came to our house drunk at 2:00 o'clock in the morning.

Q. Have you got a pretty violent temper?

A. Do I have what?

Q. A pretty violent temper.

A. No, I don't.

Q. Pretty easy-going gal?

A. Most of the time. This has my nerves on edge. I [835] think everybody can understand that. I'm very upset, and I'm trying not to cry.

Q. And you didn't make any threats to Amy Forrester today at 3:45?

A. No, I did not.

Q. You didn't make any –

A. I said, "You lied, and I know you lied, and you know you it and I know it, and we have to live in the same town. We both live in Hamilton." And I did not say "county," you got that wrong.

Q. Thank you, ma'am. We'll see if we can correct that. Okay?

MR. SHERROD: That's all I have, Your Honor.

MR. BIRDSONG: That's it, Judge.

THE COURT: You may step down, Mrs. Brewer.

* * *

No. 6997-A

X IN THE 47TH DISTRICT COURT
X
X IN AND FOR
X
X RANDALL COUNTY, TEXAS

[Caption Omitted In Printing]

DEFENDANT'S SPECIAL REQUESTED CHARGE AT PUNISHMENT NO. 8

(Filed June 1, 1991)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, BRENT RAY BREWER, Defendant in the above styled and numbered cause by and through his attorneys of record and pursuant to Article 36.16, Texas Code of Criminal Procedure, requests this court prior to the submission of the the [sic] charge to the jury that the court submit the following Defendant's requested instruction:

SPECIAL ISSUE NO. 4

You are instructed that the term "mitigating evidence" is evidence about any aspect of the Defendant's background, his character, and the crime of which he was convicted that you believe, in fairness or mercy, calls for a sentence less than death. The purpose of this fourth special issue is to provide you the jury, if you deem it necessary, with a means of considering and giving effect to the mitigating evidence, if any, presented in this case. The sole question before you now is whether, considering all the evidence, mitigating, if any, and otherwise, presented in both phases of this trial by either party, the death

penalty is a reasoned moral response to the Defendant's background, his character, and to the crime of which he was convicted.

Now bearing in mind these instructions and definitions, you will answer the following special issue:

Do you find from the evidence, after considering fully the Defendant's mitigating evidence, if any, that the death penalty is a reasoned moral response to the Defendant's background, his character, and to the crime of which he was convicted?

Answer

We, the Jury, unanimously find and determine that the answer to this Special Issue is "Yes."

_____

FOREMAN OF THE JURY

OR

We, the Jury, or at least ten (10) jurors, find and determine that the answer to this Special Issue is "No."

_____

FOREMAN OF THE JURY

In the event that the Court declines to charge the jury in any legally sufficient manner on the issues set out in the foregoing Defendant's Requested Special Charge, the Defendant would hereby object to the Court's failure to charge the jury properly.

Respectfully submitted,

/s/ C.R. Daffern
C.R. DAFFERN
1800 S. WASHINGTON,
SUITE 313
AMARILLO, TEXAS 79102
(806) 372-8215
STATE BAR #05308500

~~/s/~~ Kent Birdsong
KENT BIRDSONG
621 S. FILLMORE
AMARILLO, TEXASS [sic] 79101
(806) 371-9333
STATE BAR #02333630

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion has been hand delivered to the Randall County District Attorney's office, Randall County Courthouse, Canyon, Texas, 79015, on this the 1 day of June, 1991.

/s/ C.R. Daffern
C.R. DAFFERN

ORDER

~~GRANTED~~/DENIED on this the 1st of June, 1991. JUDGE PRESIDING

/s/ David L. Gleason
JUDGE PRESIDING

No. 6997-A

X IN THE 47TH DISTRICT COURT
X
X IN AND FOR
X
X RANDALL COUNTY, TEXAS

[Caption Omitted In Printing]

DEFENDANT'S SPECIAL REQUESTED CHARGE AT PUNISHMENT NO. 11

(Filed June 1, 1991)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, BRENT RAY BREWER, Defendant in the above styled and numbered cause by and through his attorneys of record and pursuant to Article 36.16, Texas Code of Criminal Procedure, requests this court prior to the submission of the the [sic] charge to the jury that the court submit the following Defendant's requested instruction:

> 1. When you deliberate about the questions posed in the Special Issues, you must consider any mitigating circumstances supported by the evidence presented in both phases of the trial. A mitigating circumstance is any aspect of the defendant's character and record or the circumstances of the crime which, in fairness or mercy, calls for a sentence less than death. If you find that there are any mitigating circumstances, you must decide how much weight they deserve and give them effect when you answer the Special Issues. The law does not identify or limit the aspects of the defendant's character and record or the circumstances of the crime that are mitigating. The law does not impose a formula for

determining how much weight a mitigating circumstance deserves. You are the sole judge of whether mitigating circumstances exist and if so, how much weight they deserve.

2. You may deliberate as a body about mitigating circumstances, but you are not required to reach an unanimous verdict as to their existence or weight. When you vote about the Special issues, each of you must decide for himself whether mitigating circumstances exist and, if so, how much weight they deserve.

3. You must consider and give mitigating effect to all of the mitigating circumstances, including those that have no relationship to any of the Special Issues. You must independently weigh each mitigating circumstance without reference to its relationship to the Special Issues.

4. There are two ways for you to give mitigating effect to the mitigating circumstances you have found. You may use a mitigating circumstance to answer a Special Issue "no" or you may use a mitigating circumstance as a basis for leniency even if you are persuaded that all of the Special Issues must be answered "yes." If you decide that all of the Special Issues must be answered "yes" and you also have found mitigating circumstances which call for a life sentence, you must not answer the Special Issues. Instead, to give effect to the mitigating circumstances, you must write the word "life" in each of the spaces on the verdict sheet where you would otherwise answer the Special Issues "yes" or "no." A verdict of "life" has the same effect as a verdict that answers at least one Special Issue "no."

5. If you decide that an aspect of the defendant's character and record or the circumstances of the crime is a mitigating circumstance, you must not give it aggravating effect. Thus, if in your judgment, a mitigating circumstance independently calls for a life sentence even though it also tends to support a "yes" answer to a Special Issue, you must not answer the Special Issue "yes," but rather you either answer it no or you may use it as a basis for a vote for mercy and write the word "life" in your verdict form.

In the event that the Court declines to charge the jury in any legally sufficient manner on the issues set out in the foregoing Defendant's Requested Special Charge, the Defendant would hereby object to the Court's failure to charge the jury properly.

Respectfully submitted,

/s/ C.R. Daffern
C.R. DAFFERN
1800 S. WASHINGTON,
SUITE 313
AMARILLO, TEXAS 79102
(806) 372-8215
STATE BAR #05308500

/s/ Kent Birdsong
KENT BIRDSONG
621 S. FILLMORE
AMARILLO, TEXASS [sic] 79101
(806) 371-9333
STATE BAR #02333630

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion has been hand delivered to the Randall County District Attorney's office, Randall County Courthouse, Canyon, Texas 79015, on this the 1 day of June, 1991.

/s/ C.R. Daffern
C.R. DAFFERN

ORDER

~~GRANTED~~/DENIED on this the 1st of June, 1991.

/s/ David L. Gleason
JUDGE PRESIDING

NO. 6997-A

§ IN THE 47TH DISTRICT COURT
§
§ IN AND FOR
§
§ RANDALL COUNTY, TEXAS

[Caption Omitted In Printing]

CHARGE OF THE COURT

MEMBERS OF THE JURY:

The defendant, BRENT RAY BREWER, has been found guilty by you of the offense of capital murder. You are instructed that a sentence of life [imprisonment /s/ DG 6-1-91] or death is mandatory on conviction for capital murder. In order for the court to assess the proper punishment, questions called special issues are submitted to you. Before answering these issues, you are instructed as follows:

I.

The burden of proof on this phase of the trial is still on the State; and the State has the burden to prove beyond a reasonable doubt that the answer to each issue submitted to the jury should be "Yes". The jury may not answer any issue "Yes" unless the jury agrees unanimously on such answer.

II.

The jury may not answer any issue "No" unless ten or more jurors agree. If any juror has a reasonable doubt as to the answer of any issue, the juror shall vote "No" as to that issue.

III.

If there is any issue on which the vote of the jurors is not unanimously "Yes" or not at least 10 in favor of an answer of "No," then there shall be no answer for that issue and the foreman will not sign his name to any answer form for that issue. The jury may not discuss or consider the effect of failure of the jury to agree on the answer to an issue.

IV.

In answering the issues hereinafter submitted, you may consider all of the evidence admitted during the first phase of the trial, before your verdict of guilty, as well as all of the evidence admitted during the punishment phase of the trial.

V.

You are instructed that certain evidence was admitted before you in regard to the defendant's having committed offenses other than that for which he is now on trial. You are instructed that such evidence cannot be considered against the defendant in your deliberations unless you first believe that such offenses were committed by the defendant beyond a reasonable doubt.

VI.

You are instructed that, as used in the first special issue, the word "deliberately" has a meaning different and distinct from the word "intentionally," as that word was previously defined in the charge at the guilt/innocence phase of the trial. You will recall that the word "intentionally" as

defined in the charge at the guilt/innocence phase of the trial was defined as follows: a person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result. The word "deliberately", as used in the first special issue, means a manner of doing an act characterized by or resulting from careful and thorough consideration; characterized by awareness of the consequences; willful, slow, unhurried, and steady as though allowing time for a decision.

You have already found that the defendant acted intentionally in committing capital murder. The first special issue requires you to determine whether defendant's conduct in causing the death of the deceased was also committed deliberately, as that term has now been defined for you. If you believe that the defendant acted intentionally, but you have a reasonable doubt whether his conduct was also deliberate, you will answer the first special issue "no."

VII.

Under the law applicable to this case, the defendant, if sentenced to a term of imprisonment, may earn time off the period of incarceration imposed through the award of good conduct time. Prison authorities may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.

It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the award of parole.

Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served equals one-fourth of the sentence imposed or 15 years, whichever is less, without consideration of any good conduct time he may earn. Eligibility for parole does not guarantee that parole will be granted.

It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant, because the application of these laws will depend on decisions made by prison and parole authorities.

You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant.

VIII.

Our law provides that a defendant may testify in his own behalf if he elects to do so. This, however, is a privilege accorded a defendant, and in the event he elects not to testify, that fact cannot be taken as a circumstance against him.

In this case, the defendant has elected not to testify, and you are instructed that you cannot and must not consider, discuss, allude to, comment upon or refer to that fact throughout your deliberations or take it into

consideration for any purpose whatsoever as a circumstance against him.

IX.

In arriving at the answers to the issues submitted, it will not be proper for you to fix the same by lot chance or any other method than by a full, fair and free exchange of the opinion of each individual juror.

X.

During your deliberations in this case, you must not consider, discuss, or relate any matters not in evidence before you. You should not consider or mention any personal knowledge or information you may have about any fact or person connected with this case which is not shown by the evidence.

XI.

After you have retired to the jury room, no one has any authority to communicate with you except the officer who has you in charge. You may communicate with the Court in writing through the officer who has you in charge. Do not attempt to talk to the officer who has you in charge, or the attorneys, or the Court, or anyone else concerning any question that you may have.

XII.

After the reading of this charge, you shall not be permitted to separate from each other. After argument of counsel, you will retire and consider your answers to the

issues submitted to you. It is the duty of your foreman to preside in the jury room and vote with you on the answers to the issues submitted.

/s/ David L. Gleason
JUDGE PRESIDING

FILED IN OPEN COURT

/s/ David L. Gleason
Judge Presiding
Date: 6-1-91 2:28 pm.

NO. 6997-A

X IN THE 47TH DISTRICT COURT
X
X IN AND FOR
X
X RANDALL COUNTY, TEXAS

[Caption Omitted In Printing]

* * *

[868] STATE'S CLOSING ARGUMENT

MR. FRISTOE: Thank you, Your Honor. May it please the Court, Counsel. Ladies and gentlemen of the jury, the Judge has just read to you the special issues that are to be submitted to you with his Charge.

The Charge also contains a paragraph that says that you as a jury can consider all of the evidence in this case, everything at the guilt-innocence stage, everything at the punishment stage in arriving at your verdict. The Court goes on down to define deliberately for you.

And as you know from the selection process [869] in this case, counsel for both sides spent a lot of time on these two particular words with each of you.

The Court has defined deliberately for you. He has also chosen to define intentionally as you used it at the guilt-innocence phase of this trial.

What I want to go over with you is some of the evidence in this case that you can take back and apply to Special Issue No. 1, and that is the deliberateness of the Defendant's conduct in causing the death of Robert Laminack. And also for Special Issue No. 2, which deals with the probability that the Defendant will commit criminal

acts of violence that would constitute a continuing threat to society.

You remember that we talked with you about deliberately being an act characterized by or resulting from careful and thorough consideration, characterized by awareness of the consequences, willful, slow, unhurried, steady as though allowing time for decision.

Let's look at the evidence in this case and see how the conduct of the Defendant in this case is, without doubt, deliberate.

If you remember from the evidence, it was testified to that the Defendant was evicted from this apartment with the two ladies, left the [870] apartment after packing his belongings.

MR. BIRDSONG: Excuse me. I need to make an objection at the Bench, Judge.

THE COURT: Very well.

(Thereupon, the following

(proceedings were had at the

(Bench:

MR. BIRDSONG: Your Honor, at this time, the Defendant proffers its objection in stating that – the evidence during the guilt-innocence phase was not retendered for the punishment phase of the trial.

We object to any references made by the State regarding the guilt-innocence evidence, as construed by no means alluded to or referred to or remarks about any evidence not before; specifically, that was presented in the guilt-innocence phase of the trial, and we cite the Court the

Fifth Amendment, Sixth Amendment and Fourteenth Amendment, United States Constitution; Article 1, Section 10, 13, and 19 of the Texas Constitution; Article 105 of the Code of Criminal Procedure; Article 37.07 and 37.071 of the Criminal Procedure.

THE COURT: Your objection is overruled. [871] In the event you wish to restate this objection later during argument –

MR. BIRDSONG: I think you covered it. I don't want to interrupt his argument in any sense of the word.

THE COURT: If you wish to interpose the same objection, please refer to it as Defendant's Punishment Argument Objection No. 1.

MR. BIRDSONG: Is it the court's position that only – every time he comments on the guilt-innocence evidence, I will have to do that?

THE COURT: If you wish to.

MR. FRISTOE: Your Honor, I'm going to object to the Court allowing him to do that, because I am going to be doing that the entire time of my argument. And – I mean, he could object at each –

THE COURT: Just one objection will cover it.

MR. BIRDSONG: That is why I went ahead and wrote it out the way I did.

THE COURT: The objection is overruled.

(Thereupon, the following

(proceedings were had before

[872] (the Court and jury, to-wit:

MR. FRISTOE: As I said, ladies and gentlemen – as I stated previously, this deliberate conduct can be seen by the fact that the Defendant packed his bags, told his companions in the apartment, "I'm going to leave. I'm going to go find a ride to the Salvation Army."

Left his belongings there, though. All he carried with him was a butterfly knife. A butterfly knife that you heard Dr. Coons describe up here, and as you can see for yourself when you look at it, it is meant for nothing – nothing other than to maim or kill. That's all that type of weapon is for.

So, he leaves to get a ride to the Salvation Army with a butterfly knife. He walks ~~from the~~ Raintree Apartments to Mr. Wonderful's parking lot. There Ivy Craig is confronted.

Ivy Craig is a lucky lady. Ivy Craig would be a dead lady if she had given them that ride.

MR. BIRDSONG: Judge, that's conjecture. We object.

THE COURT: Overruled.

MR. FRISTOE: Then it got too hot in the parking lot at Mr. Wonderful's, because too many people around, so they go around, and they see Mr. [873] Laminack working in his shop, asked Mr. Laminack to help this sick girl by taking her to the Salvation Army.

Now, folks, this is the Mr. Laminack that this family started with that night. That's him.

So he goes, talked to his daughter, said, "I'm going to help these folks." They are standing outside and we know

what they are thinking. We know what he's thinking, excuse me.

MR. DAFFERN: Okay. I'm going to object to reference to "they," Your Honor." The only conduct that is –

MR. FRISTOE: I just withdrew that, Mr. Daffern. He thought it was –

MR. DAFFERN: Well, I would like for the Court to rule on my objection, please, Counsel.

THE COURT: Objection is sustained.

MR. DAFFERN: I would ask the jury be instructed to disregard "they," Your Honor.

THE COURT: The jury is so instructed.

MR. DAFFERN: Further, because of the prejudicial nature of that, I would move for a mistrial.

THE COURT: Denied.

MR. DAFFERN: Thank you.

[874] MR. FRISTOE: He thought it. Mr. Laminack's daughter couldn't convince him not to do that. He comes back, gets in the pickup, and as we pointed out earlier in the guilt-innocence phase, drove hardly a block.

Then from the evidence, you can build a scenario as to how this man was attacked. The wound to his right shoulder.

I submit to you that that wound was inflicted while Mr. Laminack was driving his pickup and lifts that arm to protect himself.

Then we have the steering wheel grabbed, his foot kicked off of the accelerator, and his right arm grabbed. Then, as Dr. Erdmann showed you, that natural instinct to protect your neck, he puts his face down and he gets this one.

Then the deliberateness. The deliberateness. Here it comes. The consequences that this Defendant knew would result. The consequences. Because we've got him grabbing for the knife. We've got him trying to defend himself, and he gets this. He gets this.

Then, we stretch him back. He stretched him back. He's in the back seat. He stretches him over that seat and then cuts his throat.

[875] When that happens – when that happens, Mr. Laminack's life spatters on the window. And he's there, and as we can see, and as we know, he watches himself bleed to death. He watches himself bleed to death.

Then, we apply this evidence in the brutality of what is before you there, to whether or not this Defendant will commit criminal acts of violence that are a continuing threat to society.

Can there be any doubt? Can there be any doubt at all, when he's willing to do that? When he's willing to leave an apartment and do that to this man that was nothing but a good citizen, a kind man willing to help.

The Laminack family started with that and ended with this. And that should be a consideration in your verdict.

MR. DAFFERN: I'm going to object to that, Judge, as a request for community wants.

THE COURT: Overruled.

MR. FRISTOE: There is your deliberateness. There is your deliberateness. There is your continuing threat and the manner in which he inflicted it.

Mr. Laminack had him a new Ford pickup, [876] 2200 miles on it, and he had that cup in the seat with him that night. That's his blood on that cup. That's his blood.

Well, life doesn't begin at retirement for Mr. Laminack. That's when it ends.

But have you seen – you've sat in this courtroom, you've sat here like all of us have for four days, and have you seen one ounce of remorse out of this person, one ounce of remorse?

MR. BIRDSONG: Your Honor, that's a comment on –

MR. FRISTOE: Your Honor, the jurors are allowed to observe the Defendant.

MR. BIRDSONG: Let me object at the Bench.

THE COURT: All right, sir.

(Thereupon, the following
(proceedings were had at the
(Bench in the presence of, but
(presumably out of the hearing
(of the jury:

MR. BIRDSONG: We object to Mr. Fristoe's remark regarding Mr. Brewer, which is my client, as a comment on his failure to testify.

THE COURT: Overruled.

(Thereupon, the following

[877] (proceedings were had before

(the Court and jury, to-wit:

MR. FRISTOE: You haven't seen it. You didn't see him cry for Mr. Laminack. You've seen them cry for Mr. Laminack. You haven't seen him –

MR. BIRDSONG: That is not in evidence. I object.

THE COURT: Overruled.

MR. FRISTOE: This photograph that was introduced, there is his attitude toward what he's accused of. There is his attitude.

You can look at that and say, well, I wonder who's fault that is, because it wasn't his.

There is your deliberateness that started here, ends here. And then here's what society could look forward to from this Defendant.

Both special issues should be answered "yes." The evidence supports that. There can be no doubt that it supports it. Thank you very much.

THE COURT: Defendant may present argument.

DEFENDANT'S CLOSING ARGUMENT

MR. BIRDSONG: Thank you, Judge; Counsel. Ladies and gentlemen, I'm going to visit with you for a

while. I'm not going to holler at you again, but I [878] am going to use some visual aids, also.

I do want to thank you for your time. What we are talking about today is what is fixing to happen. And you have a harder job now than you did at guilt-innocence.

And I can sit here, and I can talk to you about Mr. Laminack, and you've made a decision regarding Mr. Laminack and found Brent guilty of capital murder.

But now you have to decide what happens to Brent. And the bottom line is this: Is it life in prison, or is it death?

And we talked about certain factors and certain things that need to be considered. There's nothing that any of you all can do today that is going to bring Mr. Laminack back to these folks.

You're going to have to make some decisions, and some hard decisions. And I want to help you think about certain things that happened during the trial that will help you make those decisions and answer those special issues.

Now, we talked about deterrence as a function of punishment, rehabilitation as a function of punishment, and retribution during voir dire. And that's what you all need to be thinking about.

[879] And I submit to you there's a reason that the Prosecutor wanted to show more gruesome pictures to you and keep that in your mind. You know, the bottom line is we have to look forward and determine whether the State has carried their burden for the "yes" answers or for the

"no" answers. And that's your job. That's what you're fixing to do.

When you look at what they showed you for the deliberateness, for the extra regarding – you've already found intentional, but now you've got to determine deliberate.

The people they brought in to you during the second phase of the trial, not many of them said much about deliberateness. And when they were talking about deliberateness or how they could get to it or add it on, I submit to you the other side of that coin is a robbery went awry.

Mr. Fristoe told you that Ivy Craig was lucky because she didn't get killed. Well, folks, there is a different side of that coin; there's two sides to this side. A robbery went awry.

You saw in the video that – the knife in the truck. You also saw from the video there was another person present, you know. And we have listened to the witnesses from the State testify [880] about Kristie Nystrom. We have listened to the witnesses put on by the Defense testify about Kristie Nystrom.

And I submit to you, if you consider it all, they haven't carried the burden to get past the deliberate on Special Issue No. 1. When it comes to Special Issue No. 2, you have got to determine whether Brent will be a continuing threat to society through criminal acts of violence.

What did the State give you to come up with a "yes" answer for that?

They had to reach all the way back to when he was boy and bring in teachers from when he was a child. And I

submit to you that the reason they did that was because there was no acts adjudicated as an adult.

The State would have brought in here pen packs if he had had a felony conviction. They would have marched Sheriff's deputies in here to tell you he was a bad prisoner while he was here. You didn't see any of that.

What you saw was people coming up here from all over the nation, talking about a kid, talking about a boy. And when they talked about it, they couldn't remember very much.

[881] But we got into evidence the facts about the Cedar Hill. And when you read this, you're going to see Brent's version, and you're going to read Brent's version about what happened at the school. And I submit to you that doesn't help you get to a "yes" on Special Issue No. 2.

He explains how he got put in in-school suspension or AEP. And that's a kid talking. Why would the State want to get little-boy stuff in? Because they don't have the real stuff.

They go a little bit further, though, and they get his girlfriend from Mississippi, Amy Forrester.

And it's interesting that I was the one that had to bring out that Amy and Brent dated for a year. Amy and Brent were physically intimate for a major amount of that time.

And I don't know what to think, other than when that kind of stuff is going on with children – kids that young, feelings are strong. They try to make it sound like Brent pushed her into a locker to break her back, cause her to be paralyzed.

The paralysis is at issue. The bottom line is, there was an argument, she got in his face, he pushed her back and all of a sudden, she's hurt.

[882] Folks, that's not something that going to help you get to "yes" on Special Issue No. 2 when you look at it for what it is.

Then they go to Florida. They talk about Brent being involved with some older folks. He is driving for them. And Officer Mosher couldn't wait to tell us about how bad that neighborhood was. I think he told us four times. And there's a reason for that.

They wanted to make you think about that, but not the fact that Brent was involved with older people that had an influence on him. And one of them was a woman, one of them was an older man.

When you look at that in its proper context, it's not helping you to get to "yes" on Special Issue No. 2.

Mosher wanted to talk about how close that knife was to him. He didn't talk about putting it in Brent's hand in any sense of the word.

What he did talk about was John Greenman had made threats to the police and they wanted to pull over Greenman's car to see if Greenman was in there. Folks, put it in its proper context.

Those things that are out there, there's not a one of you on the jury, there's not a one of us [883] in this courtroom that can't think when we were 16, 17, 18, 19, and we did something that we got in trouble for.

Every one of us will be able to say that at that time, we were with somebody else. Whenever we got in the most trouble, somebody else was there.

Each of these times, Brent has been influenced by a girl, has been influenced by older folks, has been influenced by the co-defendant in this case, Kristie Nystrom.

And this is the picture Mr. Fristoe didn't want to put on here. And I'm certain when I sit down and C.R. sits down, they will be able to pull off the tag, the paper that I put on, but this is the blood of Mr. Laminack and the blood of Kristie Nystrom on a fingerprint. And it's there for you all to consider just as well. And here she is. It's there, also.

Your choice on Special Issue No. 2 is to determine whether – which of these is going to have the major influence on your verdict. Retribution, eye for an eye, is that what we've seen, is that what the State has proven up? I don't think so.

And we talk about Albert, and we talk about his father. Folks, dysfunctional families are not an [884] excuse, and we're not here to tell you about an excuse. What I'm here to tell you is that they are factors for you to consider when you are dealing with these issues.

Life in prison will make sure that Brent will not be around woman that can influence him; will not be around fathers that can hurt him and beat him and influence him. Life in prison will get him away.

You know, the hypothetical that the Prosecutor talked with Dr. Coons about was based on lots of things. And I don't know how many times he used the term "assume." I lost count after ten.

We've all heard the little saying about "assume." But what I want you to realize is the facts that he talked about, that he assumed his answers on were facts that he didn't have – he didn't have the chance to see how those witnesses testified, like you did.

He didn't get the chance to see their demeanor. He didn't get a chance to see whether Skee was telling the truth or not. Those are the things that you've got to see. And Dr. Price came in and told you that doctors do not have anything special that you all don't have to help answer those issues.

I submit to you the hypothetical that Dr. [885] Coons answered regarding Special Issue No. 2, it's a house made of cards, it's a sand castle. It can be washed away when you realize that you've got more information in front of you than Dr. Coons ever had.

I'm fixing to sit down now, but I want you to realize that this is what we're here for. You're determining what to do about Brent in answering those special issues.

Again, there is nothing that you all can do to bring Mr. Laminack back, but you've got to determine whether you are there to say retribution, eye for an eye; you've got to determine whether you're going to say deterrence and rehabilitation.

Folks, I submit to you the special answers on both issues should be answered "no." Put Brent in the penitentiary forever. Thank you.

THE COURT: Defense may continue argument.

MR. DAFFERN: Thank you. May it please the court, Mr. Sherrod. Ladies and gentlemen, what you have

to do at this phase of the trial, I feel, will be harder than what you had to do at the first portion of the trial. You have to make a decision whether Brent Brewer will get the death sentence or a sentence of life in the penitentiary.

We didn't really put any evidence on at the [886] first stage of the trial. We had no evidence to put on.

We tried to bring forward what we could that we thought would help you in any decision you had to make at this stage of the trial.

What did you hear? Well, you have two issues, is what you have, and the Court has given you the Charge. And probably all of you, or most of you recall from voir dire, we talked to you extensively about the word "deliberately."

Now, we asked, you know, if you have found that a person has intentionally committed capital murder, would you just automatically answer that question "yes" when you get to this stage.

Well, this is why we asked you that question. Because deliberately – if you recall, we went over it back and forth, and the Judge instructs you on deliberately. And he says – and listen, you will get the Charge.

I ask that when you go back, you read all of the Charge. It is important. It may seem like semantics, but it is important that you follow the law the Court has given to you.

Resulting from careful and thorough consideration characterized by the awareness of the [887] consequences, willful, slow, unhurried, and as though allowing time for a decision.

Is that what the facts of this case show? Is that what the facts of this case show? Unhurried, willful, slow. That's somewhat different from intentional.

We talked with some of you about deliberate in that regard, willful, slow, unhurried. The knife, if you recall, was found at the scene. The vehicle was left there, just left on the road.

Does that show willful planning? Does that show unhurried consideration? Is this a crime – and listen, the crime is just gruesome. But I would submit to you any capital murder case is gruesome.

You don't get to a capital murder case without having terrible, terrible facts. And that occurs in any capital murder case.

But what shows deliberate conduct here? Is it – and I'm sure Mr. Sherrod will get up and tell you, well, it could have been formed in a moment, just like I break that pencil.

Well, willful, slow, unhurried. Look at the facts on the thing. The knife was fund [sic] there. We give our real name when we go to the hospital. Listen, is that planned?

[888] And Mr. Sherrod will say, well, he's just – you know, he didn't plan very well. You know, he's just – he is deliberate and dumb. I'm sure that's what he's going to say, you know. Didn't think.

That is not deliberate, people. It's not deliberate.

Now, you received school records. You received for your consideration, for whatever it might mean to you, an

involuntary commitment, because of mental illness and presenting a substantial risk of harm to himself or others.

Now, is that the type of conduct that can plan, deliberate? And you can say, well, I wouldn't – you know, that conduct is so bad, you know, on the thing. You can read that many different ways.

But that's Brent. That's Brent. You know, we couldn't make that up. You know, it's fact.

Now, I want to talk to you just a moment about Dr. Coons. Now, Dr. Coons came in here to get you to – answered one question.

He came in here, and Mr. Sherrod will get up and tell you what [sic] he came here, and he told you that there is a probability – and he did say that – that based on all this hypothetical assumption, that [889] Brent Brewer, this man, would commit criminal acts of violence that would be a continuing threat to society. That's the reason he came here.

Never examined him. And listen, what kind of testimony – what is that worth? This, I would submit to you, is a hired doctor. You know, he is just a hired gun to come in here and say, hey, you ought to kill this man. You know, I travel the country testifying. And he never examined him.

We brought Dr. Price in, not to examine – testify, but to counter Dr. Coons, if he did. I don't know. You may not have believed what Dr. Price said.

Does it not make sense to you if you don't examine someone – I don't know. Maybe you feel like someone says, "I'm a psychiatrist," you're just going to believe anything that person says.

Well, if you recall, you can either take that opinion or cast it away. Would you take an opinion like that about someone you know from a psychiatrist who had not examined the person? Would you do that?

If you wouldn't, then why would you kill a person, answer the question "yes," based upon a psychiatrist who has never examined the person?

[890] You ought to be able to see, as well as a psychiatrist could, from the facts, and that's the – and you saw facts that you may take or discard. What he had was a hypothetical assumption.

I submit to you, it could be a situation where a doctor could say hypothetically, I could fly, you know. Hypothetically, a doctor can do anything.

Do not – please do not act upon that type of testimony. I ask that you answer the two special issues no.

And let's go to the second special issue just a moment. Let's talk about a probability. What does a probability mean?

A probability. We talked about that some on voir dire. A likelihood, a probability that Brent in the future would commit criminal acts of violence.

Now, criminal acts of violence. What criminal acts do you have before you here?

Well, one criminal act that you have is carrying a concealed weapon. Now, is that a criminal act of violence? I submit it is not. Carrying a concealed weapon.

Also, failure to get a Florida driver's license. Boy, that is a criminal act of violence right there. You've got to have that.

[891] Now, you have an act of violence towards his father. That was not filed on. That was not a criminal act. You heard his father testify that, in the father's opinion, that was justified. A terrible home life. Terrible home life.

And you saw his dad when he testified. You know, that man came up here and told you that he had done wrong, and his conduct has caused this.

His mother testified as to what kind of home situation. Is that evidence that would not help you to answer criminal acts of violence in Special Issue 2? No. Continuing threat to society.

Let's talk about one thing a moment. You have found Brent guilty of capital murder. The Court in the Charge tells you that if the questions are answered "no," that he will be sentenced to a term of imprisonment. He will not be eligible for parole until the actual time served equals one-fourth of the sentence imposed or 15 years, whichever is less, without any consideration of any good conduct time he may earn.

Well – and also, it further says eligibility for parole doesn't guarantee that any parole will be granted.

Now, you can say, well, I guess Mr. Sherrod [892] will get up and say, you know, you shouldn't even think about that. He ought to forfeit his life. He should forfeit his life.

Mr. Birdsong talked to you about retribution. I don't know. This is a hard job. This is a job that you're –

Anyway, as I said, I'm sure we all wish none of us were here, and everyone probably wishes that this had never occurred. But it has. It has.

He's going to be punished, whatever you decide. Which ever way you decide those issues should be.

And it's a hard job you have. I don't envy you. I would not wish to be a juror on a capital murder case. I would not wish to be.

I would ask that considering all the facts, your answered to those special issues is "no." I do not feel the evidence is there to show the deliberate conduct. I don't feel you have heard evidence that should convince you beyond a reasonable doubt – and do you realize that the State still has that burden of proving to you beyond a reasonable doubt.

Now, it isn't a situation where you have to decide that Kent and I should convince you. The State is the one that has to convince you.

[893] If you have a doubt, a reasonable doubt, about the answer to that question, then you should answer that question "no." And I would ask you to do that.

Do not answer those question "yes." Whatever you do decide, we appreciate your concern. We know it's been a long trial.

Many times, I've been up in front of a jury and tell the jurors, you know, thank you for your consideration in this ease; you know, you all are what makes the system work, things like that.

Your decision is a life-and-death matter to Brent Brewer. Thank you.

THE COURT: State may close argument.

STATE'S REBUTTAL ARGUMENT

MR. SHERROD: May it please the Court, ladies and gentlemen, counsel. There's a few words missing up here. Beneath Kristie, you need to put Albert Brewer, and you probably ought to throw in deliberately. You probably ought to throw in no threat to society.

Do you know why? Like this piece of paper, we try to cover the facts up, don't we? Every one of those terms, folks, tries to hide from you [894] what that man did.

I'm no [sic] going to thank you for serving as a juror, because you didn't volunteer. You don't have to thank me, because I do this job. It's my livelihood. You don't have to thank them for representing him. It's a job to be done. It's a job, folks.

You know, you can sit there in your house at night, and you can watch on television terrible crimes that occur in our society today. And it seems to increase. It seems to be going up.

You can sit there, and you can say, what the heck can we do, what can we do? You can do one thing: Perform your job as a juror.

Contrary to what Mr. Daffern would have you believe, I don't have the power to say whether he lives or dies. You don't have the power to say whether he lives or dies. You answer the questions according to the evidence, must like you did at the guilt or innocence. That's all.

It's not a matter of life and death. It's whether it was deliberate. Was this act deliberate? Will he continue to commit violent acts? That's all you answer.

And every one of you people told me you [895] would base that not upon the result, but upon what the evidence dictates you must do.

If you do that and he gets life, a fair trial is had. If you do that and he dies tomorrow, a fair trial was held.

You have to do your job. I have to do mine. And these people have to do theirs. And if everyone does their job, a fair trial results.

Deliberate conduct. You break into a house at night, and one of the people in the house awakes, and you pull a gun and fire one time at an object. Deliberately done? Perhaps not. Intentionally done? No question.

You pull a man's head back, you render him helpless, while this woman holds his right arm, and stab him once, and he lives. You stab him twice, and he lives. And he begs you, "Boy, don't kill me. Boy, don't kill me." And he cuts your throat. Four times. Four times. Whatever it took, this man was going to do.

If it took one, he would have done it. It if took 20, he would have done it. He wanted him dead. He wanted that man dead, right there, right then. Deliberate conduct?

You go to a place, and you try to pick up a [896] woman, and you have a woman approach her. What more better opportunity than to have another young female approach a female to try to get her to give you a ride. Plan it? Deliberate conduct?

You wait until this man goes in, and you climb behind him in the middle of the seat, and the woman gets in the front on the right. And you only go a block. And these predators are upon you –

MR. BIRDSONG: Judge, I've got to object.

MR. SHERROD: – not demanding –

MR. BIRDSONG: More prejudicial than probative.

THE COURT: Overruled.

MR. SHERROD: – not demanding money, but killing you, and then they'll find out what you have on you. Because whatever you've got, they are going to try to take, and they are going to do it quick. That's the sole intent of this whole act, folks.

He may not be smart. He may not have gone through the pockets, he may not have taken the truck, he wanted out. He didn't want to be caught with the weapon. He wanted out. He didn't want to be caught with the truck. He wanted out.

But the act itself, the act of the killing, wanting the money, wanting the man dead, how much [897] more deliberate can you get?

Do you have to carve him up like a slab of beef before a jury will find it's deliberate conduct? No, you shouldn't have to.

Future threat? What kind of man can beat his father with a broom? What kind of man can do that? Not once, not to render him helpless, three or four times, five or six

times. What kind of man can say that he loves a woman and slam her with this kind of force up against a locker?

That ought to tell you one thing: If he will do that to people that he's supposed to love and respect the most in this world, and he will do it to total strangers, there is no more dangerous predator in our society than those kinds. None.

The ones you love, the ones you're supposed to respect, complete strangers for whatever money they have, $140? What kind of people kill for that? The kind that will do it as long as they're alive.

You place him in the penitentiary and someone else will get hurt. I think you know that.

By the time he is 15 years of age, from that time on, he carries weapons, he carries knives. And why does he do it? To hurt people. Do we have to have four, five, six more victims?

[898] I sometimes think that's what our society has gotten to. Not just one poor person. He's dead, we can't bring him back. Everybody makes a mistake once in their life.

That's the attitude this society has gotten to. Everybody is entitled to one little mistake. There's plenty of violence around. What kind of person does that to a man that's willing to give him a ride? What kind of person can sit there, if that person is struggling, and take a knife this close and bury it into his neck and feel that man's blood on his body; and what kind of woman can sit there with his right arm gripped while the blood spurts from his neck into the back of her hair, all over the back of her shirt?

What kind of people do that? What kind of human people can do that?

And, you know, folks, you can take a puppy, and you can beat that puppy and you can make him mean, but if that dog bites, he is going to bite the rest of his life, for whatever reason.

Whatever got him to this point, he is what he is today. And that will never change. That will never change.

All that's happened to this time or all [899] those years cannot change the violence and the cold, cold-bloodedness that he's exhibited right here. Not one tear. Not one tear, because life means nothing to him. Zero.

You go back, you look at the evidence and you decide, not because of a poor family and not because of the survivors, because of the evidence that you see that he has shown.

And what word have you had and heard that assures you he won't continue to do that? Zero. Zero.

Do your job, folks. And if you don't think that's sufficient, then you decide life is going to be the result, if you decide that he will not continue these acts, that there is no evidence showing it, let your conscience answer that "no," let it be done.

But you go back there and look at the wounds it took to kill this man. And if you come back with an answer "no," you're not looking. It's nothing but a sympathetic verdict.

You can't get more deliberate than wanting a man to die for that. If you feel comfortable that he will be walking

in any society, in the penitentiary or anyone [sic] else, and he will not be a [900] continuing threat to whoever is around him, that can be your decision, and you can sleep with it, and we'll live with it.

But base your decision on what's dictated according to the facts and not on what punishment must be assessed.

Do what the facts say, answer the questions according to the law, and a fair trial will be held. Thank you.

THE COURT: The jury may retire and consider your answers to the issues.

(Thereupon, the jury retired to (the jury deliberation room at (3:24 p.m.

* * *

No. 6997-A

X IN THE 47TH DISTRICT COURT
X
X IN AND FOR
X
X RANDALL COUNTY, TEXAS

[Captioned Omitted In Printing]

Now bearing in mind the foregoing instructions, and fully considering all the evidence, presented at both phases of this trial, by either party, the special issues, with forms for your answers, are as follows:

SPECIAL ISSUE NO. 1

Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant, BRENT RAY BREWER, that caused the death of the deceased, Robert Doyle Laminack, was committed deliberately and with the reasonable expectation that the death of the deceased would result?

Answer

We, the Jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "Yes."

/s/ Jimmy Myers
FOREMAN OF THE JURY

OR

We, the Jury, because at least ten (10) jurors have a reasonable doubt as to the matter inquired about in this Special Issue, find and determine that the answer to this Special Issue is "No."

FOREMAN OF THE JURY

SPECIAL ISSUE NO. 2

Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, BRENT RAY BREWER, would commit criminal acts of violence that would constitute a continuing threat to society?

Answer

We, the Jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "Yes."

/s/ Jimmy Myers
FOREMAN OF THE JURY

OR

We, the Jury, because at least ten (10) jurors have a reasonable doubt as to the matter inquired about in this Special Issue, find and determine that the answer to this Special Issue is "No."

FOREMAN OF THE JURY

VERDICT OF THE JURY

We, the jury, having answered the foregoing issues, return the same into Court as our verdict.

/s/ Jimmy Myers
FOREMAN OF THE JURY

FILED IN OPEN COURT
/s/ David L. Gleason
Judge Presiding
Date: 6-1-91 6:50 p.m.

TEXAS COURT OF CRIMINAL APPEALS

BRENT RAY BREWER, Appellant

NO. 71,307 v. Appeal from RANDALL County

THE STATE OF TEXAS, Appellee

OPINION

Appellant was convicted of capital murder pursuant to Tex. Penal Code Ann. § 19.03(a)(2). The jury affirmatively answered the punishment issues and appellant was sentenced to death. Tex. Code Crim. Proc. Ann. art. 37.071(b). Appeal to this Court is automatic. *Id.*, at (h). Appellant raises twenty-five points of error in his original brief and nine points of error in a supplemental brief.[1] We will affirm.

Appellant does not challenge the sufficiency of the evidence. Therefore, we will address only the facts necessary to resolve the points of error.

In point of error one, appellant contends the trial judge erred in permitting the admission of appellant's Florida offense and conviction records into evidence. On appeal, appellant complains that the admission of State's Exhibit 201 violated Tex. R. Crim. Evid. 107, 901, 1001, 1002, and 1003. However, at trial, appellant objected to the introduction of the exhibit because it "cor ains hearsay,

[1] Many of appellant's points are multifarious. However, in the interest of justice, we will address them. *Thomas v. State*, 723 S.W.2d 696, 697, n. 2 (Tex.Cr.App. 1986). We do not suggest that any party should brief this way in the future. *See*, Tex. R. App. P. 74(d); *Russell v. State*, 598 S.W.2d 238, 245 (Tex.Cr.App. 1980) (by presenting multifarious points, appellant risks rejection on ground nothing is presented for review).

contains final judgments, [and] it's improperly bolstering." Since the issue raised on appeal does not comport with appellant's trial objection, nothing is presented for review. *Johnson v. State*, 803 S.W.2d 272, 293 (Tex.Cr.App. 1990); *Thomas v. State*, 723 S.W.2d 696, 700 (Tex.Cr.App. 1986). Appellant's first point of error is overruled.

In his second point of error, appellant contends the trial judge erred by not instructing the jury on the lesser-included offense of murder. Appellant contends the lesser-included offense of murder was raised because Skee Callan's credibility was questionable, a witness saw a person walking near the deceased's vehicle after the crime, and an "unaccounted for" fingerprint was found on the outside of the truck near the driver's door. Appellant asserts this evidence proves another perpetrator must have robbed the victim, therefore, lessening the instant offense to murder rather than capital murder.

In determining whether appellant is entitled to a charge on a lesser-included offense, we consider all of the evidence introduced at trial, whether produced by the State or the defendant. *Goodwin v. State*, 799 S.W.2d 719, 740 (Tex.Cr.App. 1990); *Dowden v. State*, 758 S.W.2d 264, 269 (Tex.Cr.App. 1988). We use a two-pronged test in our review. *Rousseau v. State*, 855 S.W.2d 666 (Tex.Cr.App. 1993); *Goodwin*, 799 S.W.2d at 740-741; *Dowden*, 758 S.W.2d at 268. First, the lesser-included offense must be included within the proof necessary to establish the offense charged. *Id.* Second, there must be some evidence in the record that if the defendant is guilty, he is guilty only of the lesser-included offense. *Id.* The credibility of the evidence and whether it conflicts with other evidence or is controverted may not be considered in determining whether an instruction on a lesser-included offense should

be given. *Marras v. State*, 741 S.W.2d 395, 405 (Tex.Cr.App. 1987).[2]

Murder is a lesser-included offense of capital murder. Art. 37.09(1); *Thomas v. State*, 701 S.W.2d 653, 656 (Tex.Cr.App. 1985). Therefore, appellant has met the first prong of the test. However, appellant fails to meet the second prong. The evidence adduced at trial shows that on April 26, 1990 appellant and Kristie Lynn Nystrom convinced the deceased to give them a ride in his truck. Appellant rode in the back seat. After traveling approximately one block, appellant stabbed the deceased several times in the neck while Nystrom held the deceased's right arm to prevent him from fighting back. The deceased's jeans were pulled down over his buttocks and a blood transfer stain from his wallet was found on his underwear. Nystrom was later seen with the deceased's blood-soaked wallet and truck keys. Further, appellant stated to Skee Callan that he had killed a man for $140 – the same amount of money that the deceased was believed to have at the time of his death. Michelle Francis, appellant's and Nystrom's roommate, testified that neither appellant nor Nystrom had any money earlier that day. However, both were later able to purchase bus tickets to Dallas. After reviewing this evidence, we conclude there is no evidence from which a rational trier of fact could conclude that appellant was guilty only of murder. Even if Callan's testimony is excluded, we conclude that there is no evidence of another perpetrator adequate to warrant a charge on the lesser-included offense of murder. Appellant's second point of error is overruled.

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[2] Overruled on other grounds by *Garrett v. State*, 851 S.W.2d 853, 860 (Tex.Cr.App. 1993).

Appellant's third point of error contends the trial judge erred in admitting blood comparison evidence containing blood taken from appellant pursuant to a search warrant. Appellant contends the search warrant affidavit contained false information and was, therefore, invalid. Specifically, he argues that the affiant, officer Greg Soltis, knowingly misled the magistrate in the first line of paragraph five of his affidavit, which states: "According to the affidavit of [affiant], daughter and employee of the deceased, the deceased was transporting BRENT RAY BREWER and Kristie Lynn Nystrom to the Salvation Army in deceased pickup." The deceased's daughter did not name the passengers in her father's vehicle in her affidavit. Appellant contends that without this misrepresentation the magistrate could not have found probable cause to issue the warrant.

When a police affiant makes statements in a search warrant affidavit which are intentionally false or made with reckless disregard for the truth, the statements must be excised from the affidavit before determining whether the affidavit affords probable cause for the issuance of the warrant. *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S.Ct. 2674 (1978); *Hass v. State*, 790 S.W.2d 609, 611 (Tex.Cr.App. 1990). A search warrant will not issue unless the sworn affidavit sets forth sufficient evidence:

> (1) that a specific offense has been committed, (2) that the specifically described property or items that are to be searched for or seized constitute evidence of that offense or evidence that a particular person committed that offense, and (3) that the property or items constituting evidence to be searched for or seized are located at or on the particular person, place, or thing to be searched.

Tex. Code Crim. Proc. Ann. art. 18.01(c). We use a "totality of the circumstances" test to determine if probable cause existed to issue the warrant. *See, Illinois v. Gates*, 462 U.S. 213, 238-239, 103 S.Ct. 2317, 2336 (1983); *Green v. State*, 799 S.W.2d 756, 757 (Tex.Cr.App. 1990).

Excising the allegedly false statement, the affidavit sets out the following evidence:

> 2. [Appellant] is currently incarcerated in the Randall County Jail and suit case(s) containing the personal belongings of [appellant] that were with [appellant] at the time of his arrest in Ellis County, Texas, by officers of the Red Oak Police Department, have been transported to the Randall County Sheriff's Department where they have remained unopened since [appellant]'s incarceration.
>
> 3. Affiant was present during the autopsy of [the deceased] performed by [a] forensic pathologist. [The pathologist] told affiant that the deceased . . . died of stab wounds.
>
> 4. Affiant has reviewed the police reports and affidavits of the following witnesses: Anita Lynn Piper; Charlotte Clarkson; Steven Callen III; and Debra Campbell Houston.
>
> 5. Ms. Piper observed a male in the back seat of the deceased club cab pickup and someone else in the front passenger seat of the deceased pickup.
>
> 6. According to the affidavit of Debra Campbell Houston, she observed a pickup parked on 49th Street, Amarillo, Randall County, Texas at approximately 9:28 p.m. This pickup was later identified as the pickup [belonging to the deceased]. [Houston] observed a male slumped over

in the driver's seat, later identified as the deceased. [Houston] further observed a blonde headed person in the pickup.

7. Affiant has received identifying information and clothing [sic] a description of [Nystrom] and [appellant] from Steven Callen III, in which [Callen] verifies that [Nystrom] has blonde hair.

8. According to [Callen], [Nystrom] and [appellant], came to his apartment at 4205 W. 51st Street, Oak Tree Apartments, Amarillo, Texas, the evening of April 26, 1990. [Callen], observed both [Nystrom] and [appellant] to have blood on their persons and their clothing.

9. [Appellant] reported to [Callen], that he [appellant] stabbed the deceased with a knife.

10. [Nystrom] reported the [sic] [Callen], that while [appellant] stabbed the deceased with a knife, she [Nystrom], took control of the steering wheel of the pickup and applied the brake to stop the vehicle.

11. [Callen], observed [Nystrom] to be in possession of a brown wallet that [Nystrom] reported was the wallet of the deceased.

12. According to Charlotte Clarkson, [Nystrom] and [appellant] changed their clothes, that appeared to be stained with blood, at her apartment #217E, located at 4205 W. 51st St., Oak Tree Apartment, Amarillo, Texas, on the evening of April 26, 1990. Affiant has obtained a blood stained diaper from [Clarkson], that [Clarkson] reports was used to wipe blood from the bodies of [Nystrom] and [appellant].

13. [Callen] observed a cut on [appellant]'s hand and drove [appellant] to Palo Duro Hospital for medical attention.

14. [Callen], later drove [Nystrom] and [appellant] to the bus station, in Amarillo, Potter County, Texas, with their suit cases containing their personal belongings, including the blood stained clothing worn during the commission of the offense that [Nystrom] and [appellant] reported to [Callen].

15. Affiant has observed the interior of the pickup of the deceased and area surrounding said pickup. Affiant has further collected blood samples and hair samples and fibers from the interior of deceased pickup as well as the area immediately surrounding the deceased pickup.

16. Affiant has been trained in the identification of blood spatters and blood stain patterns. Affiant has identified a blood stain trail away from the pickup of the deceased and believes that one or both of the suspects were injured during the assault on the deceased.

17. Affiant has further identified blood spatters in the interior of the deceased pickup, as well as, collected body hair from the interior of the deceased pickup.

18. Affiant requests that a warrant be issued authorizing any peace officer to obtain from [appellant]:

(a) blood and saliva samples

(b) search of the suit case(s) in the possession [appellant] and [Nystrom] for clothing containing blood stains, fibers, hairs and other forensic evidence.

Without deciding whether Soltis intentionally misled the magistrate, we find the affidavit in question contains facts sufficient to support a finding of probable cause. The affidavit shows that a specific offense has been committed, that the specifically described property or items that are to be searched or seized constitute evidence of that offense or evidence that a particular person committed that offense, and that the property or items constituting evidence to be searched or seized are located at or on the particular person, place, or thing to be searched. Consequently, the trial judge did not err in admitting the blood comparison evidence. Appellant's third point of error is overruled.

In points of error four and five, appellant contends the trial judge erred in admitting "too many gruesome photographs and videotaped evidence" of the deceased's body and the ensuing crime scene.[3]

Appellant's first contention involves the photographs of the deceased's body at the scene of the crime and at the autopsy. He contends "*any* eighty percent of the photos were too inflammatory, and that any twenty percent of the photos depicting the body and the blood stains were probative enough to prosecute the case."[4] Appellant does not identify which of the "more than 35" photographs he complains of on appeal. At trial, appellant objected to

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[3] Despite the multifariousness of these points and the glaring inadequacy of briefing, in the interest of justice, we will address the merits of appellant's argument. *See, Thomas*, 723 S.W.2d at 697, n. 2; *but see*, Rule 74(d) Tex. R. App. P. Ann.; *Russell*, 598 S.W.2d at 245 (multifarious); *Coble v. State*, ___ S.W.2d ___, ___ (Tex.Cr.App. No. 71,084, delivered Nov. 3, 1993) slip op., pg. 14 (inadequately briefed). *See*, n. 1, *supra*.

[4] Appellant does not challenge the relevancy of these exhibits.

forty-six photographs depicting the deceased and the crime scene.[5] We shall review these photographs for error.

When determining whether the trial judge erred in admitting photographs into evidence, our review is limited to determining whether the probative value of the photos is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence. Tex. R. Crim. Evid. 403; *Long v. State*, 823 S.W.2d 259, 271 (Tex.Cr.App. 1991), citing *Montgomery v. State*, 810 S.W.2d 372, 389 (Tex.Cr.App. 1991) (Opinion on Rehearing).

A court may consider many factors in determining whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice. These factors include: the number of exhibits offered, their gruesomeness, their detail, their size, whether they are in color or black and white, whether they are close-up, and whether the body depicted is clothed or naked. *Long*, 823 S.W.2d at 272. However, a court should not be limited by this list; the availability of other means of proof and the circumstances unique to each individual case should also be considered. *Id.*

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[5] Appellant objected at trial to the following: State's exhibits 4, 7, 11, 12, 15, 16, 17, 18, 19, 24, 25, 28, 30, 31, 32, 33, 76, 77, 78, 79, 86, 86-A, 87, 88, 90, 91, 93, 94, 99, and 100 had a "cumulative effect, and the sole purpose . . . is to prejudice the jury." State's exhibits 20, 27, 34, and 35 were introduced solely to prejudice the jury. State's exhibits 21 and 22 were introduced to inflame the jury. State's exhibit 23 was gruesome and more prejudicial than probative. State's exhibits 46, 47, 48, 49, 50, 51, 52, 82 and 82-A were not needed by Dr. Erdmann, the forensic pathologist, to describe the injuries and were only introduced to prejudice the jury.

In reviewing these photographs, we note initially that thirty-nine are 8" x 10" and the remaining seven are approximately 4" x 5". All the photographs are in color. Appellant does not explain why he believes the photographs were inflammatory except to point out that they were cumulative and "particularly gruesome." Nineteen of the photographs are of the deceased, eleven of these at the autopsy. The photos were used at trial to depict the location and condition of the deceased at the crime scene and, at the autopsy, to show the wounds causing death and the defensive wounds on the deceased's hands and knee. Although many of the pictures are gruesome and detailed, they are not enhanced in any way and portray no more than the gruesomeness of the crime scene and the injuries inflicted. *See, Narvaiz v. State*, 840 S.W.2d 415, 429 (Tex.Cr.App. 1992). The remaining twenty-eight photographs depict blood spatters and smears on the interior and exterior of the deceased's truck, accumulated blood in the interior of the truck, blood-latent fingerprints of appellant and Nystrom, and the blood smears and fingerprints on the murder weapon. We do not view any of these photographs to be more gruesome than any other murder scene. Although some of the photographs may seem repetitive, they were used at trial to illustrate the bloodstain pattern analysis and document the location of the bloodstains, followed by closeups to better view the described patterns. After reviewing all of the objected to photographs, we are not persuaded the danger of unfair prejudice substantially outweighed their probative value. Therefore, we hold the trial judge did not err in admitting the exhibits.

Appellant next contends the videotapes, State's exhibits 89-A and 89-B, were cumulative of the photographic

evidence and were more prejudicial than probative.[6] Further, he contends that where portions of the videotape were rewound and replayed, it amounted to bolstering and repetitious testimony. However, appellant did not object on the grounds of bolstering and repetition at trial. Since his trial objection does not comport with the issues raised on appeal, he has preserved nothing for appellate review with respect to these complaints. *Thomas*, 723 S.W.2d at 700; *Johnson*, 803 S.W.2d at 293. Therefore, we will address only appellant's "prejudicial" and "cumulative" arguments.

Because silent videos or "motion pictures" are merely a collection of photographs the rules for admission are the same. *Huffman v. State*, 746 S.W.2d 212, 222 (Tex.Cr.App. 1988). State's exhibit 89-A is a videotape of a trail of blood drops leading away from the scene of the crime, appellant was believed to have been cut during the attack. This video shows the drops of blood and the direction of their trail. It was not cumulative of any photograph or the other video and had no prejudicial effect.

State's exhibit 89-B is a videotape portraying the general overview of what those arriving at the scene observed. It shows the location of the truck, the condition of the ground around and the exterior of the truck, the condition of the interior of the truck and the deceased. The video is probative of the fact and manner of death. *See, Gordon v. State*, 784 S.W.2d 410, 412 (Tex.Cr.App. 1990). Further, the video is not cumulative of the photographic exhibits. The focus of the photographs is isolated and

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[6] The videotapes were admitted prior to the admission of most of the photographs objected to by appellant. *See*, n. 5, *supra*. Both videos were played before the jury with the audio portions deleted.

specific while the video provides a panoramic view of the crime scene, placing the deceased, the weapon and the bloodstains in perspective. The information relayed is different. Admittedly, like the photographs, the video is bloody and gruesome. However, the crime committed was gruesome and the video depicts nothing more than what happened to the deceased. *See, Narvaiz*, 840 S.W.2d at 429. After viewing the tape in its entirety, we conclude that it's probative value is not substantially outweighed by it's prejudicial effect. The trial judge did not abuse his discretion by admitting the videotape of the crime scene.

Appellant's third argument contends he was denied his right to confrontation because of the manner in which State's exhibit 89-B was shown and testified to by Officer Soltis, and that this denied him effective assistance of counsel.[7] At trial, the State introduced State's exhibit 89-B into evidence and Soltis, on direct examination, explained to the jury what they were observing on the videotape. The description was elicited from Soltis in a question/answer manner. Appellant objected that this was narrative and that he was losing his right to confront the witness. The trial judge overruled the objection and reminded appellant that he would have an opportunity to cross-examine Soltis. After a considerable amount of testimony, appellant again objected that he was losing his right to effective assistance of counsel via his right to confrontation of the witness. Further, he stated: "And at the end of this, I'm either going to be forced to go back to form any question to this expert and replay the tape which would just, in my mind, enhance it in front of the jury, or ask no questions." The trial

[7] Appellant did not object at trial to the manner in which State's exhibit 89-A was testified to or shown.

judge then afforded appellant the opportunity to cross examine Soltis as he made his statements. However, appellant took advantage of this on only two occasions. Then, during normal cross-examination, appellant questioned Soltis once concerning the videotape. At the end of his cross-examination, appellant requested that the first seventeen minutes of the video be struck from the record because he had not been afforded the opportunity to cross-examine until after that point. The trial judge overruled the objection. Appellant did not question Soltis further.

A defendant is entitled to a fair opportunity to cross-examine a State's witness. However, the confrontation clause only guarantees an *opportunity* for effective cross-examination. U.S. Const. amend. XI and XIV; Tex. Const. art. I, § 10; *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989 (1987).

The record reveals that appellant was given ample opportunity to cross-examine Soltis concerning the substance of the videotape. Further, appellant did not make it known to the trial judge that he believed that he would have to replay portions of the tape to effectively cross-examine Soltis until after the first seventeen minutes of the tape had played. We cannot conclude the trial judge abused his discretion in overruling appellant's objections. Because appellant was not denied his right of confrontation, we hold appellant was not deprived of effective assistance of counsel. Points of error four and five are overruled.

In points of error six and seven, appellant contends the trial judge erred in allowing Officers Soltis and Bob Henderson to testify as bloodstain experts. Appellant

further asserts that Henderson's testimony was repetitious of the testimony elicited from Soltis.

The special knowledge which qualifies a witness to give an expert opinion may be derived from specialized education, practical experience, a study of technical works, or a varying combination of these things. Tex. R. Crim. Evid. 702; *Holloway v. State*, 613 S.W.2d 497, 501 (Tex.Cr.App. 1981). Whether a witness offered as an expert possesses the required qualifications is a question which rests largely in the trial judge's discretion and the decision to admit or exclude the testimony will not be disturbed absent a clear abuse of discretion. *See, Duckett v. State*, 797 S.W.2d 906, 910 (Tex.Cr.App. 1990).

At trial, appellant objected to Soltis' testimony because he had not yet been qualified as an expert. The State asked various questions regarding Soltis' experience and training in the area of crime scene investigation and bloodstain evidence. Soltis testified he was a detective with the Amarillo Police Department, and had been assigned to the Special Crimes Unit for the previous six and a half years. Soltis processed and recorded crime scenes for the Special Crimes Unit, which required that he photograph and videotape each scene, make sketches of the scene, as well as collect and preserve evidence found at the scene. Soltis attended bloodstain-pattern analysis school held at the Oklahoma City Regional Police Academy. He testified that he paid particular attention to bloodstain and spatter evidence at crime scenes. We cannot conclude the trial judge abused his discretion by allowing Soltis to testify concerning the location and types of bloodstains and spatters found at the scene of the crime.

With regards to Henderson, appellant objected that "under Rule 702 of the Rules of Criminal Evidence [Henderson is] not qualified as an expert." Prior to appellant's objection, the State elicited evidence that Henderson was a crime scene investigator for the Randall County Sheriff's Department. Henderson had over 400 hours of training in crime scene investigation from the Texas Department of Public Safety and the Federal Bureau of Investigation. Further, Henderson attended a bloodstain-pattern interpretation school taught by one of "the foremost bloodstain interpreters in the United States," Captain Bevel. Henderson conducted various experiments in bloodstain interpretation with Bevel and worked on two previous homicide cases with him. Henderson previously testified as an expert in bloodstain interpretation. We cannot conclude the trial judge abused his discretion by determining Henderson was qualified as an expert in the interpretation of bloodstains.

Finally, we cannot conclude Henderson's testimony was repetitious of Soltis'. Soltis' testimony was limited to identifying if a stain was blood, the type of bloodstain, how it would accumulate, and its location at the scene. Henderson's testimony concerned the interpretation of the bloodstain patterns, the process he used to reconstruct the crime, and his subsequent findings. Although Henderson was required to use several of the same exhibits as Soltis, his testimony was not necessarily repetitious. We overrule appellant's sixth and seventh points of error.

In his eighth point of error, appellant contends the trial judge erred in refusing to include, in the jury charge at the punishment phase, an instruction submitting the

third punishment issue.[8] In order to raise the issue of provocation, there must be evidence of the deceased's conduct and that evidence must be sufficient to be considered provocation. *Lucas v. State,* 791 S.W.2d 35, 65 (Tex.Cr.App. 1989); *Hernandez v. State,* 643 S.W.2d 397, 401 (Tex.Cr.App.1982). In the instant case, there was no evidence of any provocation by the deceased. The only evidence of the deceased's conduct immediately prior to his murder was giving appellant and Nystrom a ride and pleading, "Boy, please don't kill me; boy, please don't kill me." The trial judge did not err in refusing the requested instruction. Appellant's eighth point of error is overruled.

In points of error nine, eleven, thirteen, and fifteen, appellant contends the jury charge and the Texas capital sentencing scheme violated the Eighth and Fourteenth Amendments to the United States Constitution and, specifically, *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934 (1989).[9]

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[8] Tex. Code Crim. Proc. Ann. art. 37.071(b)(3) reads:

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(3) If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

[9] Specifically, appellant's points of error are:

Point of Error Number 9: THE TRIAL COURT REFUSED TO SUBMIT A THIRD SPECIAL ISSUE TO THE JURY WHICH WOULD HAVE REQUIRED THEM TO ANSWER WHETHER THEY FOUND THAT APPELLANT SHOULD RECEIVE A LIFE SENTENCE, RATHER THAN A DEATH SENTENCE; CONSEQUENTLY, APPELLANT'S DEATH SENTENCE IS INVALID BECAUSE THE JURY DID NOT HAVE A VEHICLE TO EXPRESS ITS' REASONED MORAL RESPONSE TO ALL OF THE RELEVANT MITIGATING EVIDENCE

(Continued on following page)

Resolution of these points requires a review of the relevant decisions of the United States Supreme Court. The Supreme Court first considered the constitutionality of Tex. Code Crim. Proc. Ann. art. 37.071 in *Jurek v. Texas,* 428 U.S. 262, 96 S.Ct. 2950 (1976). The Court held that art. 37.071 was constitutional when considered with our broad interpretation of the statute. In short, the statute allowed for the consideration of mitigating circumstances through the jury's deliberation on the punishment issues.

In *Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954 (1978), the Supreme Court stated, "[W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a

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IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Point of Error Number 11: APPELLANT'S SENTENCE OF DEATH IS INVALID BECAUSE ARTICLE 37.071 OF THE TEXAS CODE OF CRIMINAL PROCEDURE, AS APPLIED IN THIS CASE, LIMITED THE JURY'S CONSIDERATION OF MITIGATING EVIDENCE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Point of Error Number 13: APPELLANT'S DEATH SENTENCE IS INVALID BECAUSE ART. 37.071(B)(1) IS UNCONSTITUTIONALLY VAGUE, AND AS THAT STATUTE WAS APPLIED TO APPELLANT, THE JURY WAS PRECLUDED FROM GIVING THE TYPE OF INDIVIDUAL CONSIDERATION TO THE MITIGATION EVIDENCE MANDATED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Point of Error Number 15: THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTION TO THE PUNISHMENT CHARGE AND REQUESTED INSTRUCTION REGARDING THE LAW OF MITIGATING EVIDENCE AS SPELLED OUT IN *PENRY.*

basis for a sentence less than death." *Id.*, 438 U.S. at 604, 98 S.Ct. at 2964-65 (emphasis in original). There must be an individualized consideration of all mitigating factors. However, the weight to be placed upon the mitigating evidence is wholly within the province of the fact finder. *Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869 (1982).

In *Franklin v. Lynaugh,* 487 U.S. 164, 108 S.Ct. 2320 (1988), the Supreme Court addressed whether a separate instruction was required for the consideration of mitigating evidence offered during trial. The only evidence offered was Franklin's good behavior during his previous incarcerations. The Court found this type of mitigating evidence could be considered within the scope of the second punishment issue submitted under art. 37.071 and no additional instruction was required.

The following term, in *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, the Supreme Court was presented with evidence of Penry's mental retardation, disadvantaged background and organic brain damage resulting in poor impulse control and an inability to learn from experience. In *Penry,* the Court held art. 37.071 was unconstitutional *as applied* because the statute failed to provide the jury with a vehicle to give effect to the mitigating evidence. *Penry,* 109 S.Ct. at 2949. The punishment issues did not provide a vehicle for the effective consideration of Penry's mitigating evidence – the very nature of Penry's mitigating evidence affirmatively answered the second punishment issue.

Therefore, in addressing these points of error, we must determine: 1) what mitigating evidence was presented to the jury; 2) whether the two punishment issues provided a vehicle for the jury to give effect to that

evidence, and, if not, 3) whether the trial judge provided, in its charge to the jury on punishment, a vehicle for the jury to effectively consider the mitigating evidence. *Joiner v. State,* 825 S.W.2d 701, 706 (Tex.Cr.App. 1992).

Appellant's mitigating evidence, as set forth in his brief and the record, consists of the following:

> 1) Appellant was not mentally retarded, but was involuntarily committed on January 1, 1990, for "major depression, single episode, without psychotic features, polysubstance abuse." The examining physician based his opinion on a suicide note appellant wrote to his mother. On January 25, appellant signed a request for voluntary admission to Big Springs State Hospital for fourteen days.[10]
>
> 2) Appellant came from an abused background where he was ignored by both his father and step-father. He did not have a relationship or live with his real father until after he was fifteen-years old.[11] Appellant's father hit him on several occasions, once with the butt of a pistol and once with a flashlight. Appellant's father frequently beat his mother. Appellant's father had once told him, "If you ever draw your hand back, you'd better kill me because I'll kill you."
>
> 3) Appellant had smoked marijuana when he was a teenager.

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[10] As discussed in point of error sixteen, *infra,* appellant chose not to enter the records from Big Spring State Hospital into evidence.

[11] Appellant did see his biological father when he was five months old and for a short period of time when he was five years old. There is no evidence of abuse during either of these encounters.

We conclude the second punishment issue provided an adequate vehicle for the jurors to give effect to appellant's mitigating evidence. We have held a stay in a mental hospital does not evidence a "long term mental illness which would affect appellant's ability to conform to the requirements of society." *Joiner,* 825 S.W.2d at 707. As in *Joiner,* the evidence shows no more than appellant's threat to commit suicide and a stay at a hospital on one occasion. *Id.* Further, appellant's evidence of drug abuse and an abusive homelife was given effect within the scope of the punishment issues. *Ex parte Ellis,* 810 S.W.2d 208, 211-212 (Tex.Cr.App. 1991) (drug addiction); *Goss v. State,* 826 S.W.2d 162, 166 (Tex.Cr.App. 1992) (abusive household).

We hold the trial judge properly refused appellant's requests for an additional instruction; that the second issue provided a vehicle for the jury to express its reasoned moral response to appellant's mitigating evidence; and, that art. 37.071 was not unconstitutional as applied to appellant because the jury was given a vehicle to consider the mitigating evidence. Points of error nine, eleven, and fifteen are overruled.

Additionally, in his thirteenth point of error, appellant makes the argument that art. 37.071(b)(1) is vague and unconstitutional as applied to him; and it prevented the jury from being able to consider any mitigating circumstances in answering the first punishment issue. As noted above, the punishment issues provided an adequate vehicle for the consideration of appellant's mitigating evidence. However, we will address appellant's vagueness argument.

Art. 37.071(b)(1) provides:

> (b) On consideration of the presentation of the evidence, the court shall submit the following three special issues to the jury:
>
> > (1) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result.

On appeal, appellant specifically contends the first punishment issue is a bifurcated question which would allow a juror to answer differently the terms "deliberately" and "with the reasonable expectation." He argues that because "with a reasonable expectation" can be equated with the term "knowingly," jurors will almost always answer "yes" to that term. Further, he contends that if two questions were not intended by the legislature, then "with the reasonable expectation" impermissibly modifies "deliberately" by lessening the State's burden of proof on the issue. However, in appellant's pre-trial motion to declare art. 37.071(b)(1) unconstitutional, he states that the section is vague only because "deliberately" is not statutorily defined for the jury which, therefore, allows "with the reasonable expectation" to modify or define "deliberate."

To determine whether a criminal statute is unconstitutional for vagueness, we must scrutinize the statute to determine whether it is impermissibly vague as applied to the defendant's conduct. *Motley v. State,* 773 S.W.2d 283, 287 (Tex.Cr.App. 1989). The trial judge instructed the jury on the first punishment issue as follows:

> You are instructed that, as used in the first special issue, the word "deliberately" has a

> meaning different and distinct from the word "intentionally," as that word was previously defined in the charge at the guilt/innocence phase of the trial. You will recall that the word "intentionally" as defined in the charge at the guilt/innocence phase of the trial was defined as follows: a person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscience objective or desire to engage in the conduct or cause the result. The word "deliberately", as used in the first special issue, means a manner of doing an act characterized by or resulting from careful and thorough consideration; characterized by awareness of the consequences; willful, slow, unhurried, and steady as though allowing time for a decision.
>
> You have already found that the defendant acted intentionally in committing capital murder. The first special issue requires you to determine whether defendant's conduct in causing the death of the deceased was also committed deliberately, as that term has now been defined for you. If you believe that the defendant acted intentionally, but you have a reasonable doubt whether his conduct was also deliberate, you will answer the first special issue "no."

The trial judge defined "deliberately" as requested by appellant and instructed the jury on the burden of proof for the first punishment issue. We cannot conclude that art. 37.071(b)(1) was unconstitutionally vague as applied to appellant or that the State's burden of proof was lessened. Point of error thirteen is overruled.

In points of error ten, twelve, and fourteen, appellant contends the jury charge at punishment violated the

Texas Constitution. However, appellant offers no authority or argument explaining the protection offered by the Texas Constitution or how that protection differs from the U.S. Constitution. We decline to make appellant's Texas Constitutional arguments for him. Rules 74 and 210 Tex. R. App. P. Ann.; *Johnson v. State,* 853 S.W.2d 527, 533 (Tex.Cr.App. 1992); *McCambridge v. State,* 712 S.W.2d 499, 501-02, n. 9 (Tex.Cr.App. 1986). Points of error ten, twelve, and fourteen are overruled.

In point of error sixteen, appellant contends the trial judge erred in refusing to allow appellant to make an offer of proof or bill of exception of certain medical records. Specifically, appellant wished to preserve certain *Penry* evidence for appeal, but did not wish to introduce that evidence before the jury. The trial judge stated he would allow appellant's records from Big Spring State Hospital to be offered to the jury. However, appellant declined, stating:

> I know you will, but I don't desire to. I'm going to tender this as a Bill of Proof No. 1. And the reason I'm tendering it like this is so it will go up for appellate purposes.
>
> There are Penry items in here, but from a tactical standpoint, we do not wish to tender this evidence in, but I want the appellate courts to understand that there was Penry materials. And for tactical purposes, attorneys decided not to offer it to the jury.

The trial judge again stated the evidence could be offered to the jury and appellant again refused, stating he did not wish for any psychiatric records to be placed before the jury. Appellant then cited *Ex parte Goodman,* 816 S.W.2d 383, 386, n. 6 (Tex.Cr.App. 1991), as authority for his contemporaneous offer of proof. After a careful review of

our opinion in that case, the trial judge denied appellant's request.

Appellant's reliance on *Goodman* is misplaced because *Goodman* is a decision on a pre-*Penry* case. *Goodman,* 816 S.W.2d at 384. Goodman stated his mitigating evidence was tactically withheld because presentation of that evidence would only aggravate his punishment since the jury had no means to consider it as mitigating under art. 37.071(b). *Id.* at 386, n. 6. Goodman's trial occurred in 1981, eight years prior to the decision in *Penry.* As the instant trial occurred in 1991, appellant had no tactical reason to withhold his hospital records because he would be receiving full benefit of the *Penry* decision.

Further, offers of proof and bills of exception are devices used to preserve error when a trial judge *excludes* evidence. Tex. R. App. P. 52(b); Tex. R. Crim. Evid. 103(a)(2). The trial judge in the instant case did not exclude evidence; on the contrary, the trial judge would have permitted appellant to offer the evidence. Absent an adverse ruling by the trial judge, appellant was not entitled to have his evidence included in the appellate record by an offer of proof or bill of exception. Point of error sixteen is overruled.

In his points of error seventeen through thirty-four, appellant contends the trial judge erred at voir dire. The record indicates appellant exhausted his peremptory challenges and was granted two additional peremptory challenges. After his request for more peremptory challenges was denied, appellant identified veniremember Spear as the objectionable juror who was seated on the jury. Error, if any, has been preserved. *Demouchette v. State,* 731 S.W.2d 75, 83 (Tex.Cr.App. 1986). However,

because the trial judge granted appellant two additional peremptory challenges, we cannot reverse appellant's conviction unless he demonstrates the trial judge erred in the treatment of *three* of the contested veniremembers. *Rector v. State,* 738 S.W.2d 235, 247 (Tex.Cr.App. 1986).

In nine points of error (points seventeen through twenty-five), appellant contends the trial judge erred in overruling his challenges for cause because those respective veniremembers held prejudices against aspects of the law upon which he was entitled to rely. *See*, Tex. Code Crim. Proc. Ann. art. 35.16(c)(2). In each instance, appellant used a peremptory strike to exclude the veniremember.

The denial or grant of a challenge for cause is within the discretion of the trial judge, and will not be overturned absent an abuse of discretion. *Mooney v. State,* 817 S.W.2d 693, 701 (Tex.Cr.App. 1991). We examine the record as a whole to determine whether there is support for the trial judge's decisions, and, in doing so, give great deference to the trial judge. *Satterwhite v. State,* 858 S.W.2d 412, 415 (Tex.Cr.App. 1993). This is especially true when we are faced with a vacillating or equivocating veniremember. *Id.* The trial judge is able to consider important factors such as demeanor and tone of voice that do not come through when reviewing a cold record. *Mooney,* 817 S.W.2d at 701.

In points of error seventeen through twenty, appellant contends veniremembers Marlow, Stout, Mahaffey, and Holeman could not distinguish between the terms "deliberate," as used in the first punishment issue, and "intentional," the culpable mental state of the crime:

Veniremember Marlow:

APPELLANT: Well, before you had the chance to hear the prosecutor's definitions, in your mind, was there a distinction between "deliberate" and "intentional"?

MARLOW: Probably not. You know, a fine point there, I would consider it.

* * *

APPELLANT: Mr. Marlow, all kidding aside, before you came in today, approximately an hour ago, you had about 50-some odd years of thinking that "intentional" and "deliberate" were the same thing, correct?

MARLOW: Yes.

* * *

APPELLANT: Would you agree with me, sir, that it would be real hard to set your feelings aside that you established over that many years and actually make that distinction between "deliberate" and "intentional"? Wouldn't that be real hard for you?

MARLOW: Not if it's pointed out to me the term at the time of what the definition is at the Court proceedings as being "deliberate" and "intentional." If the court itself comes out and says these are two different meanings, and it's explained to me why they have two different meanings, and if the evidence shows one way or the other, then I could eliminate my past definitions.

* * *

APPELLANT: You would require a definition of "deliberate"? Is that what I heard you say?

MARLOW: Yes.

Veniremember Stout:

APPELLANT: Do you feel that a deliberate act is always intentional?

STOUT: I think so.

* * *

APPELLANT: Can you envision of a case that after you've already found that he intentionally and knowingly caused the death, do you feel like you'd be obligated to answer that issue "yes" regarding "deliberately" or would you require more evidence to get to the "deliberately"?

STOUT: I think I'd probably need some more evidence.

* * *

APPELLANT: The deliberate conduct, are you saying that you can't envision circumstances where you could not find that this conduct was deliberate even though you've already found that it wasn't intentional?

STOUT: No. I think I'm – I still think you'd have to have deliberate conduct.

APPELLANT: Okay. So there, you're saying there is an extra amount that has to be brought in?

STOUT: Right.

APPELLANT: And you can envision a set of facts that would require more than just the intentional?

STOUT: I think you're going to have to have more than the intentional.

Veniremember Mahaffey:

STATE: Would you agree with me that that [sic] intent to do that act could be formed immediately?

MAHAFFEY: Yes, sir.

STATE: Do you see a distinction between that and the definition that I gave you for "deliberately"?

MAHAFFEY: Yes.

STATE: What distinction do you find in those two words, please, sir?

MAHAFFEY: I don't suppose any.

* * *

STATE: The legislature has – has told us that in the first phase of this trial, our – the single issue that they want us to consider is whether or not the Defendant's conduct was intentional.

Then we come along to the second phase of the trial and they've inserted the word "deliberately." And evidently, they want us to find a distinction between those two words. So that's what I'm asking you now, sir, is do you find a distinction between those two words?

MAHAFFEY: They seem sort of synonymous to me. One means about the other, I think.

* * *

STATE: Let me ask you if the concept that I told you about the pencil and my ability to break that instantly with intent, you agreed to that, didn't you?

MAHAFFEY: Yes.

STATE: Then the definition to "deliberately" includes the terms "Not rash or hasty, but to consider and reason a reason for a thing or against the thing."

Would you concede that "deliberately" seems to require a little more thought than the thought required to do it instantly as you agree with on the intent?

MAHAFFEY: Yes.

STATE: So then, my question where I asked you if in order to find something deliberately, you're going to require a little more, then now, would you change your answer to say that it would require a little more thought than intent?

MAHAFFEY: Well, by the definition you gave me, I guess so. I would have to change my – change my original answer to that.

STATE: So you're telling the Court now that you do see a distinction between "intentionally" and "deliberately"?

MAHAFFEY: Yes.

* * *

APPELLANT: How is "deliberately" different there from the "intentional" that you've already found, or is it?

MAHAFFEY: It's a fine line, but I believe what he said earlier, that when you do it in – formed in a hasty way, I believe, hastily done.

* * *

APPELLANT: Okay. If you've already found a person guilty of capital murder, have you already found that he acted deliberately?

MAHAFFEY: I suppose so.

APPELLANT: Okay. So in answering that special Issue No. 1, would it be a fair statement to you that as far as the question goes: Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death to the deceased would result? Are you going to answer that question "yes" if you found the person guilty of capital murder?

MAHAFFEY: If there's no doubt about it, yeah.

Veniremember Holeman:

APPELLANT: Now, that first special issue that you have to answer, do you find from the evidence beyond a reasonable doubt the conduct of the defendant that caused the death of the deceased was committed deliberately and with he [sic] reasonable expectation that the death of the deceased would result. If you had found that a person acted intentionally, would you automatically answer that question "yes"?

* * *

HOLEMAN: Yes, I would.

* * *

APPELLANT: And is that true because deliberately and intentionally are just so close together?

HOLEMAN: I think that's probably the situation, intentionally and deliberately. Intentionally –

APPELLANT: Do you feel like they are just so similar that you have trouble seeing the difference?

HOLEMAN: Well, if he had intent in his heart –

APPELLANT: Okay.

HOLEMAN: – to do that. If it was – well, I'm afraid they would be very close, intentionally and deliberately. Deliberately is – oh, goodness. Intentionally is just maybe the circumstances just arose all of a sudden. Deliberately is where it would be very, I think, premeditated, a plan that had been worked out.

* * *

APPELLANT: My whole problem is, if you found a person guilty of intentionally taking the life of another, would you automatically just answer that question –

* * *

Answer that first special issue, that first special issue.

HOLEMAN: I would answer that "yes."

APPELLANT: And that's because – well, – and I'[m] not trying to put words in your mouth, either, but I'm asking you, is it because the deliberately and intentionally are so similar to you that you feel like you cannot really see the distinction?

HOLEMAN: I guess it is, because intentionally means to me that thought was there.

* * *

STATE: And that's a specific definition that we have. You're not going to have to worry about what your feeling is of intentionally, but with that definition that says nothing about deliberations, nothing about preplanning, nothing about planning, can you see the distinction in that term as legally defined to you and the belief in the definition that you have in the term deliberate? Can you see a difference?

HOLEMAN: I can see a difference, but you had to bring that. In my mind, they were very close together, but now – I can see what you are –

* * *

STATE: Can you see the difference between the terms in your own mind right now?

HOLEMAN: When you – yes, I can.

* * *

TRIAL JUDGE: Before ruling, I think I'll inquire one more time.

After you have found someone guilty of intentionally causing the death of another, then you are asked a question, was his conduct deliberate.

> Would you automatically answer that question yes because you had found it intentional, or would you require something more?
>
> HOLEMAN: I would require something more, because intentional is not the same as deliberate.

Appellant challenged each of the veniremembers for cause on the grounds that they equated the statutory meaning of "intentionally" with the term "deliberately" and, therefore, would automatically affirmatively answer the first punishment issue. *See*, art. 37.071(b)(1).

A reading of the entire voir dire for each veniremember shows that initially the veniremen misunderstood the law regarding "intentional" and "deliberate." However, after the terms were explained, each demonstrated they could distinguish between them. The trial judge did not err in overruling appellant's challenges for cause. Points of error seventeen, eighteen, nineteen, and twenty are overruled.

In points of error twenty-one through twenty-five, appellant contends that veniremembers Meador, Shmidl, Glasson, Mahaffey, and Holeman could not consider the full range of punishment for the lesser-included offense of murder.[12] To be qualified veniremembers must be able to consider the full range of punishment applicable to the offense submitted for their consideration. *Fuller v. State*, 829 S.W.2d 191, 200 (Tex.Cr.App. 1992). A person who cannot consider probation as a proper punishment for the lesser-included offense of murder is subject to a challenge for cause. *Pierce v. State*, 696 S.W.2d 899, 902 (Tex.Cr.App.

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[12] In his supplemental brief, appellant discusses jurors that do not exist in the instant case. We will apply appellant's argument to the jurors whose testimony he has set out.

1985). However, a veniremember is not required to state that he could consider a probated sentence for the offense of murder in a particular factual situation. *Faulder v. State*, 745 S.W.2d 327, 339 (Tex.Cr.App. 1987). Further, the law does not require the trial judge to exclude a veniremember simply because he cannot think of a set of facts where it would be proper to give the minimum sentence. *Hogue v. State*, 711 S.W.2d 9, 27 (Tex.Cr.App. 1986).

Defense counsel asked each of the prospective veniremembers whether they could consider five-years probation for someone found guilty of murder. Each at one point said that they could not. However, each of the veniremembers also stated that they could consider and recommend five-years probation depending on the facts and circumstances of the case. No veniremember unequivocally stated that he could consider probation in *only* a mercy killing. After reviewing the voir dire of each of these veniremembers, we conclude the trial judge did not err in overruling appellant's challenges for cause. Points of error twenty-one, twenty-two, twenty-three, and twenty-five are overruled.

In point of error twenty-four, appellant also contends the trial judge erred by denying the challenge for cause of veniremember Mahaffey because he could not consider a life sentence for capital murder. Although Mahaffey stated that he would prefer the death penalty in a capital murder case, he further stated:

> A. It would be hard to – hard to give them life in the pen unless I knew all the circumstances where – give me a specific example –
>
> * * *

> Q. I'm just asking you would there ever be a situation where in your basic beliefs that a person who you found guilty of capital murder should receive a life [sic] in the penitentiary sentence rather than a death sentence?
>
> A. Well, there might be, sure.
>
> * * *
>
> Q. Okay, Would your personal views influence your decision in answering those special issues? And if you want me to, I'll read them again to your.
>
> A. I'll say no. I'll try not to let them.

The fact that Mahaffey could not think of a set of facts where life imprisonment would be proper does not disqualify him from service as a juror. In *Hogue*, we stated:

> . . . The law does not permit the exclusion of a prospective juror because he or she cannot think of a set of facts where it would be proper to give a life sentence in a capital case. Rather, [Tex. Code Crim. Proc. Ann. art. 35.16(c)(2)] provides that a juror may be challenged for cause by the defense if "he has a bias or prejudice against any of the law applicable to the case upon which the defense is entitled to rely. . . . " . . . *The inability to articulate a set of facts where a life sentence was the proper punishment does not show an inability to consider the full range of punishment.*

Hogue, 711 S.W.2d at 27. The trial judge did not abuse its discretion by overruling appellant's challenge for cause. Point of error twenty-four is overruled.

In nine points of error (points twenty-six through thirty-four, respectively), appellant contends the trial

judge erred by refusing to allow appellant to ask nine veniremembers proper questions during voir dire, thereby preventing the intelligent use of his peremptory strikes.

In *Nunfio v. State*, 808 S.W.2d 482 (Tex. Cr. App. 1991), we held:

> The standard of review in a case where the defendant claims he was improperly restricted on voir dire is whether the trial court abused its discretion. The propriety of the question which the defendant sought to ask is determinative of the issue. We have held that a question is proper if it seeks to discover a juror's views on an issue applicable to the case.

Id., 808 S.W.2d at 484 (citations omitted). *See also*, *Woolridge v. State*, 827 S.W.2d 900, 904 (Tex.Cr.App. 1992). The denial of a proper question during voir dire is always reversible error and is not [sic] be subject to a harm analysis under Tex. R. App. P. 81(b)(2). *Nunfio*, 808 S.W.2d at 485.

In point of error twenty-six, appellant attempted to ask the following question of veniremember Mahaffey:

> Well, we'll talk about a hypothetical case. I'm not talking about this case. Let's just say [sic] a hypothetical case you found a person guilty of committing a murder which is the knowing and intentional taking of the life of another *while in the course of committing robbery.*
>
> Would there ever be an instance in a case like that where you feel like that life imprisonment would be the proper punishment?

The State objected stating that appellant was attempting to bind Mahaffey to specific facts involving a robbery/ murder.

After the trial judge sustained the State's objection, the trial judge allowed appellant to question Mahaffey:

> Q. Well, not talking about that kind of a capital murder. You can have a capital murder that a person intentionally – *any capital murder.* We'll just say any case that's capital murder that you found somebody guilty of, do you fell [sic] like it would ever be proper in a capital murder case like that for a person to get life in the penitentiary rather than death?

Because the trial judge allowed this question, which was designed to determine Mahaffey's ability to consider the full range of punishment, we hold in light of the entire record, the trial judge did not improperly restrict appellant's voir dire. Finding no abuse of discretion, point of error twenty-six is overruled. See, *Allridge v. State*, 762 S.W.2d 146, 163-64 (Tex.Cr.App. 1988).

In point of error twenty-seven, appellant contends the trial judge erred by preventing appellant from asking veniremember Holeman questions concerning the range of punishment. The complained-of question asked:

> Okay. There are – I like to say there are about three groups of people who fall in three different categories in regards to their beliefs about a capital murder.
>
> And the first group, I feel like, those people, they believe like if somebody proved that a person had intentionally taken the life of another, for example, while in the course of committing a

robbery, which is capital murder, then they feel like that person should forfeit his life.

There's another group of people that feel like that if a person has intentionally taken the life of another, for example, while in the course of committing a robbery, then, depending on the facts and circumstances, possibly he should forfeit his life, or possibly should get life in prison.

And there's another group of people pretty much that feel like that if a person has, you know, knowingly and intentionally taken the life of another, for example, while committing robbery, then he should never, you know, forfeit his life, but – they just don't believe in the death sentence at all.

What group would you fall in?

After the State's objection to this question was sustained, appellant explained to Holeman the ways capital murder may be committed. Appellant then questioned Holeman:

Q. . . . My question to you was, going back to those three groups of people, there's one group of people that believes anyone who has knowingly or intentionally taken the life of another and then committed a capital murder – and I won't, you know, pin it down to any one kind – should either forfeit his own life, that's the first group.

Or the second group would be, depending on the facts, he may forfeit his own life or he, you know, may just go to the penitentiary for life.

Or the third group just never believes that you should [sic] ever take a person's life. They just believe in that person going to, you know, the penitentiary for life.

Now, my question to you, which one of those groups would you put yourself in?

A. Group two.

We hold, in light of the entire record, appellant's voir dire of Holeman was not improperly limited and the trial judge did not abuse his discretion. *See*, *Allridge*, 762 S.W.2d at 163-64. Point of error twenty-seven is overruled.

In point of error twenty-eight, appellant contends the trial judge erred by limiting appellant's voir dire concerning future acts of criminal violence:

> APPELLANT: Okay. Let me – let me just give you an example and ask you about that. And what I'm trying to do is see if you can make a determination between violent acts and non-violent acts.
>
> And let's say a person has – the proof showed – and I'm just talking about an example, I'm not talking about any specific case now.
>
> A person had been to the penitentiary for three sentences and the first sentence was for possession of marijuana, and the second time he went to the penitentiary was for auto theft, and the third time he went was for burglary.
>
> Now would that be a different set of facts to predict his future criminal acts of violence than if he had been convicted of, say, a crime of a serious threat to take a person's life?
>
> STATE: Same objection, Your Honor, the State again would object that the Defense Counsel is attempting to get a commitment from this juror on how he would rule on specific evidence. We

> urge the court that it's highly improper for him to do so.
>
> TRIAL JUDGE: Sustain the objection.
>
> APPELLANT: I would cite the Court to the *[Felder] v. State*, 758 2d 760 for that very question.
>
> * * *
>
> TRIAL JUDGE: The objection to the last question is sustained insofar as trying to bind the juror to the particular set of facts. Perhaps you can rephrase.

In support of this point of error appellant contends we approved the same question in *Felder v. State*, 758 S.W.2d 760, 763 (Tex.Cr.App. 1988). Felder contended the trial judge erred in failing to excuse a veniremember who could not set aside strong feelings on parole. *Id.*, 758 S.W.2d at 766. We held that "if a potential juror is unable to disregard parole in determining the issues as to punishment and unable to take the oath of a juror, he is subject to exclusion upon proper challenge." *Id.* Therefore, *Felder* is not controlling.

In *White v. State*, 629 S.W.2d 706 (Tex.Cr.App. 1981), the defendant attempted to question a veniremember on his ability to render a life sentence under facts similar to the case on trial. The trial judge sustained the State's objection to the question but the defendant was permitted to question the veniremember whether he could render a life sentence "if it were proved that a defendant shot someone in the head in the course of committing robbery." *Id.*, 629 S.W.2d at 706. We held the trial judge did not abuse his discretion in refusing to allow the first question and noted "the question that was permitted had more

details than the appellant was entitled to ask." *Id.* This is because:

> It is proper to use hypothetical fact situations to *explain* the application of the law. However, it is improper to inquire how a venireman would respond to particular circumstances as presented in an hypothetical question.

Cuevas v. State, 742 S.W.2d 331, 336, n. 6 (Tex.Cr.App. 1987).

In the instant case appellant was attempting to commit the veniremember to the facts stated in the hypothetical question. In other words, appellant wished to commit the juror to what constitutes a violent act. This is improper.[13] *Allridge*, 762 S.W.2d at 163-64. We hold the trial judge did not abuse his discretion. Point of error twenty-eight is overruled.

In point of error twenty-nine, appellant contends the trial judge improperly limited his voir dire of veniremember

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[13] In *Allridge*, we quoted directly from 23 Tex.Jur.3d, Criminal Law, § 2668, pp. 308-09:

> A juror may not be asked on voir dire what he would or would not do at any particular stage of the proceeding under a given state of facts. He may, of course, be interrogated touching his views of the law and the application to any fact situation that the evidence may present. Although allowing questions designed to ascertain the jurors views and sentiments on social and moral subjects generally, the courts do not permit a hypothetical case to be submitted; nor do they allow questions designed to bring out the juror's views on the case to be tried. To put into the inquiry a case, whether entirely hypothetical or the one to be presented by the questioner on the trial, is objectionable because the juror would thereby practically be pledged to a particular finding in advance of hearing the testimony.

Groppe concerning the meaning of criminal acts of violence:

> APPELLANT: Okay. And do you feel like automatically that all crimes would be criminal acts of violence?
>
> GROPE [sic]: No.
>
> APPELLANT: Can you define how you understand criminal acts of violence to be, what you would understand that term to –
>
> STATE: Your Honor, I'm going to object. I think the context that that statement was made in would be the witness may well think that he's trying to find out what specific acts constitute and I would object to it on that basis.
>
> TRIAL JUDGE: Sustained.

We agree the trial judge improperly sustained the State's objection. However, appellant was allowed to question Groppe as follows:

> APPELLANT: Ma'am, I'm not trying to do that, and maybe that's a bad question. The point I was trying to get at is to make certain that you could distinguish between violent acts and nonviolent criminal acts.
>
> * * *
>
> APPELLANT: Do you distinguish that there is a difference between violent criminal acts and nonviolent criminal acts?
>
> GROPE [sic]: Yes, I do. You could hit a child with a car and that's a criminal act, but it's not a violent intentional act.

In light of the appellant's additional questions, the sustaining of the State's objection did not improperly restrict appellant's voir dire of Grope [sic]. Point of error twenty-nine is overruled.

Appellant alleges in this thirtieth point of error that the trial judge improperly restricted appellant from questioning veniremember Clark concerning criminal acts of violence. Appellant asked the following:

> Okay. And listen, I'm not trying to get you to, you know, guess or anything like that. My question to you: Before you can answer [special issue 2], would you have to have evidence of something other than just the mere offense before you could answer that?

The State objected that appellant was requiring Clark "to designate a specific type of requirement on the evidence." The trial judge sustained the objection.

Generally, it is improper to ask a veniremember to set hypothetical parameters for their decision-making. *Allridge v. State*, 850 S.W.2d 471, 480 (Tex.Cr.App. 1991). However, the question in the instant case speaks to the juror's definition of reasonable doubt.[14] We have held on many occasions that the evidence of a capital murder may be sufficient to sustain an affirmative answer to the second punishment issue. *See*, *Burns v. State*, 761 S.W.2d 353 (Tex.Cr.App. 1988); *Bell v. State*, 724 S.W.2d 780, 803 (Tex.Cr.App. 1986); *Landry v. State*, 706 S.W.2d 105, 113 (Tex.Cr.App. 1985); *and*, *Muniz v. State*, 573 S.W.2d 792,

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[14] Appellant's trial occurred prior to our opinion in *Geesa v. State*, 820 S.W.2d 154 (Tex.Cr.App. 1991), where we adopted a definition for reasonable doubt.

794 (Tex.Cr.App. 1978). Further, in *Garrett v. State*, 851 S.W.2d 853 (Tex.Cr.App. 1993) we considered whether a juror who would require more evidence than the capital murder to answer the second punishment issue is properly excused. *Id.*, 851 S.W.2d at 859. We held:

> . . . a particular juror's understanding of proof beyond a reasonable doubt may lead him to require more than the legal threshold of sufficient evidence to answer the second special issue affirmatively. There is nothing unlawful about that; in fact, quite the opposite. As the trial judge himself explained . . . an individual juror must determine what proof beyond a reasonable doubt means to him, for the law does not tell him . . . . "

Id., 851 S.W.2d at 859. Appellant's question in the instant case sought to explore the veniremember's definition of reasonable doubt. In light of our holding in *Garrett*, we cannot say this is improper. Therefore, we hold the trial judge abused his discretion in restricting appellant's voir dire in this area. Point of error thirty is sustained.

In point of error thirty-one appellant contends the trial judge erred in refusing to allow appellant to question veniremember Eller with a hypothetical fact situation explaining the State's burden of proof. The record reveals the following:

> APPELLANT: Okay. Mr. Eller, just a couple more questions I want to visit with you about on technicalities.
>
> You understand – have you ever sat on a jury before?
>
> ELLER: Civil jury.

APPELLANT: Civil jury? Okay. In a criminal case, there is an indictment and the charging instrument. The Judge visited with you about that a little bit.

ELLER: The indictment?

APPELLANT: Yeah.

ELLER: He did.

APPELLANT: Do you understand that that is made up of elements and they have to be proven to you by the State beyond a reasonable doubt.

ELLER: Right.

APPELLANT: And I want to do a hypothetical situation wherein the State alleged in their indictment that X defendant killed Bambi by taking Bambi's life with a knife. That's what they alleged in the indictment.

The prove [sic] shows that Bambi died, Bambi was killed by X defendant, but X defendant did it with a gun. Do you follow me?

ELLER: Yes.

APPELLANT: The State has failed to prove to you an element in their indictment. Are your feelings such that – regarding technicalities, that if the State had proved that the death occurred, it was a murder, but it was the wrong weapon, wrong instrument was used, would you be able to follow the law?

STATE: Your Honor, I'm going to object at this point. He's trying to bind the juror to a particular fact situation, and it's improper voir dire.

TRIAL JUDGE: Sustained.

APPELLANT: Do you understand that the State has got to prove those elements to you beyond a reasonable doubt?

ELLER: Right.

APPELLANT: If a situation arises where one element is not proven, do you understand what you would have to do?

ELLER: Well, I think as a juror, I've got to express his opinion as far as meeting with the other jurors, if there is a decision to be made in that.

APPELLANT: My question to you is, can you follow the law and vote accordingly if that element is not proven to you beyond a reasonable doubt?

ELLER: Yes.

APPELLANT: My concern is, based on – you know, I'm hearing some personal feelings of bias, I think, and I – this is not a criticism in any sense of the word, I feel the same way about a lot of things, but I can't do my job, and you wouldn't want me to allow a juror to be seated if I was defending you that was going to place a lesser burden upon the State because they thought loopholes were being used wrongfully. Do you follow me?

ELLER: Yes, I understand what you're saying.

APPELLANT: Do you think you have a bias towards the State in any sense of the word?

ELLER: Towards the State?

APPELLANT: Yes.

ELLER: As far as – what do you mean there?

APPELLANT: That you would lessen their burden of proof.

ELLER: I don't think so. The only bias that I have is what I expressed awhile ago, as far as the judicial system as it sits today.

That there has been abuse with some laws that were originally established to protect the defendant, that have been skirted and used to water down the justice system.

* * *

THE COURT: What I need to know from you, though, is can you follow the law as it exists and as I instruct you, applying that to the evidence that you hear and make your decision only on that?

ELLER: I think I can do that as you instruct me to do it.

On appeal, appellant contends his hypothetical question was a proper inquiry into applicable law including the presumption of innocence and burden of proof under *Homan v. State*, 622 S.W.2d 372 (Tex.Cr.App. 1984). In *Homan*, the defendant contended the trial judge erred in denying a challenge for cause against a juror who "felt the indicted defendant was 'just a little bit guilty of something' and that it would take evidence to remove that feeling from his mind." *Id.*, 622 S.W.2d at 274. We reversed holding the trial judge erred in failing to sustain Homan's challenge for cause. *Id.* Thus *Homan* is not controlling. However, we agree appellant's use of the hypothetical fact situation in this case was used to explain the State's burden of proof. Thus the hypothetical fact situation was

proper and the trial judge abused his discretion in refusing appellant's question "[W]ould you be able to follow the law?" *Cuevas*, 742 S.W.2d at 336, n. 6. However, the record reveals appellant rephrased his question several times and was able to elicit the veniremember's response. In light of appellant's subsequent questions, and the veniremember's responses, we cannot say the trial judge improperly restricted appellant's voir dire. Point of error thirty-one is overruled.

In point of error thirty-two, appellant contends the trial judge did not allow appellant to question veniremember Marlow concerning mitigating evidence:

> APPELLANT: Mr. Marlow, what does "mitigating evidence" mean to you?
>
> MARLOW: I can't remember how I wrote it down there. I would just consider evidence that is questionable that might create a less severe situation or less severe charge or something like that regarding the case.
>
> APPELLANT: Can you articulate any factors that you would consider mitigating?

The State objected that appellant was attempting to bind the juror to specific evidence and the trial judge sustained.

The permissible areas of questioning the panel in order to exercise peremptory challenges "are broad and not to be unnecessarily limited." *Smith v. State*, 513 S.W.2d 823, 826 (Tex.Cr.App. 1974). In *Shipley v. State*, 790 S.W.2d 604 (Tex.Cr.App. 1990), the murder defendant sought to discover whether any veniremember had known someone harmed by an extramarital affair. *Id.*, 790 S.W.2d at 606. This inquiry was relevant because evidence was adduced

at trial that Shipley "was involved in two extramarital affairs shortly before he shot his wife." *Id.*, 790 S.W.2d at 609. We distinguished *White*, holding "the questions that was disallowed by the trial court would not have committed the jurors to a specific finding at trial." *Id.*, 790 S.W.2d at 608. Further, we found that the veniremembers' answers to the question were relevant to "an intelligent use of peremptory challenges." *Id.* 790 S.W.2d at 609.

As opposed to the questions in point of error twenty-eight and thirty, we do not believe appellant's question here was designed to bind Marlow to specific evidence. Rather, appellant's question sought to explore appellant's views and sentiments regarding mitigating evidence. Further, we believe the Marlow's answer to the appellant's question was relevant to appellant's intelligent determination whether to use a peremptory strike. Point of error thirty-two is sustained.

In point of error thirty-three, appellant sought to determine Kasper's attitude towards parole:

> APPELLANT: Would it make a difference in your answers to the special issues that we've talked about already, the fact that a possible life sentence would mean he might be – the Defendant might get out on parole? Would that cause you to answer those questions somewhat differently?

The State immediately objected and stated that the juror would receive an instruction that she was not to consider parole for any purposes when assessing punishment, and, therefore, the question was improper as posed. The trial judge sustained the objection. "The matter of parole is not a proper consideration for jury deliberation on punishment in a capital murder trial." *Jones v. State*, 843 S.W.2d 487, 495 (Tex.Cr.App. 1992). Further, appellant was allowed to

rephrase the question and elicit Kasper's feelings regarding parole. In light of the record, the trial judge did not abuse his discretion. Point of error thirty-three is overruled.

Finally, in point of error thirty-four, appellant contends the trial judge erred by sustaining the State's objection to a question posed to veniremember Hines:

> APPELLANT: Okay. My question to you: Could you ever give a person probation who you had found guilty of murder in any fact situation, other than a mercy killing?

The State objected that appellant was attempting to bind Hines "inversely to a particular fact situation." We agree. As stated before, it is improper to limit questions to a specific fact situation. *Allridge*, 762 S.W.2d at 163-64. The trial judge did not abuse his discretion. Point of error thirty-four is overruled.

We have sustained points of error thirty and thirty-two. However, because the trial judge granted appellant two additional peremptory challenges, this case may not be reversed. *Rector v. State*, 738 S.W.2d 235 (Tex.Cr.App. 1986); *see also*, *Gardner v. State*, 730 S.W.2d 675, 690, n. 9 (Tex.Cr.App 1987). Finding no reversible error, we affirm the judgment of the trial court.

BAIRD, Judge

Clinton, J., concurs in the result.
(Delivered June 22, 1994)
En Banc
Do Not Publish

NO. 6,997-A

EX PARTE	)(	IN THE
BRENT RAY BREWER,	)(	47TH DISTRICT COURT
APPLICANT	)(	IN AND FOR
	)(	RANDALL COUNTY, TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON APPLICATION FOR WRIT OF HABEAS CORPUS, FOLLOWING CAPITAL MURDER CONVICTION AND DEATH SENTENCE

(Filed Oct. 20, 2000)

On this 20th day of October, 2000, the Court enters the following findings of fact and conclusions of law concerning Applicant Brent Ray Brewer's "Application for Writ of Habeas Corpus by a Person in State Custody, Application for Stay of Execution and Evidentiary Hearing."

Findings of Fact

1. Applicant's trial counsel, C.R. Daffern, advised Applicant not to submit to a psychological or psychiatric evaluation.

2. Attorney Daffern counseled against Applicant being evaluated by a psychiatrist or psychologist for these reasons:

(a) Nothing about Applicant's behavior caused suspicion about his mental health status;

(b) Under then-controlling law, a mitigation special issue on punishment

could be submitted only when: (1) the accused had a limited intellectual functioning or brain defect and (2) that condition had a proven nexus with his commission of the crime so as to reduce his moral blameworthiness. The predicate for the punishment mitigation special issue was absent in this case. The Court advised Daffern at trial that a punishment mitigation special issue would not be given. (c) Presenting expert psychiatric and psychological evidence could be a "double edged sword" in that negative information about Applicant could be exposed and exploited by the prosecution. Possibly the jury would consider such evidence adversely to Applicant in answering the "future danger" punishment special issue

3. Attorney Daffern discussed with Applicant the relative value of developing expert psychological or psychiatric evidence. Applicant concurred with Daffern's advice that developing such evidence would not be in Applicant's best interest.

4. Habeas counsel's consultant, Nueces County medical examiner Dr. Lloyd White, examined the autopsy findings of Dr. Ralph Erdmann, the State's testifying pathologist in Applicant's trial. Dr. White's review consisted of examining Dr. Erdmann's autopsy protocol and photographs of the victim during the autopsy and the knife used in the offense. Dr. White excepted to some of the terminology Dr. Erdmann used in the autopsy protocol, and to Dr. Erdmann's opinion the victim's neck had been stretched. However, Dr. White concurred with Dr. Erdmann's conclusions

regarding wound location and cause of death: Dr. White agreed also that the wounds could have been caused by the alleged murder weapon.

5. Habeas counsel's consultant C.A. Everhart, an investigator with the Oklahoma Indigent Defense System, investigated the background of Dr. Erdmann. The information Everhart exacted, even if supported by the live testimony of the persons he interviewed, is insufficient to disprove Dr. Erdmann's qualifications or status.

6. Habeas counsel's consultant, Ronald Singer, concurred in part with the testimony of the State's blood spatter witnesses Bob Henderson and Greg Soltis. However, Singer expressed that certain spatter patterns also could have resulted from alternative scenarios not mentioned by Soltis or Henderson. Singer also questioned the adequacy of Soltis' and Henderson's training to qualify them as blood spatter experts. Nothing in Singer's letter opinion contradicts Soltis' and Henderson's testimony.

7. Skee Callen, in his August 13, 1997 affidavit, maintained that Kristie Nystrom had told him she had stabbed the victim, although he had not testified to Nystrom's telling him that. However, Callen persisted in stating that Applicant, too, confessed to stabbing the victim.

8. Applicant has not credibly suggested the prosecuting authority in Applicant's case suppressed information having potential for impeachment of Dr. Erdmann.

9. During the trial of this cause, evidence was adduced that Applicant had bragged about the offense. Other evidence evinced that Applicant's only showing of emotion during the trial was

when his father testified at the punishment phase. In his punishment argument, the prosecutor rhetorically asked whether the jurors during the trial had seen any indication of Applicant's remorse. The remark referred to the evidence of Applicant's expressions to others, and his impassive mien in court, signifying his cavalier attitude about the offense.

Conclusions of Law

1. The advice of Applicant's trial counsel that Applicant not develop expert psychiatric or psychological punishment evidence resulted from counsel's reasoned strategic analysis. Counsel was not ineffective in so advising Applicant.

2. The matters Applicant presents in the affidavits appended to his Application for Writ of Habeas Corpus do not amount to "new evidence." Instead, affiants Dr. White and Ronald Singer merely offer opinions which differ from those of Dr. Erdmann and Bob Henderson on noncritical issues in the case. Similarly, the matters about which Skee Callen avers in his new affidavit are not inconsistent with Applicant's guilt. Even taken as true, the matters Applicant here presents do not show clearly and convincingly that no reasonable juror would have convicted him in light of the new information.

3. Applicant's due process rights were not violated, because he has not credibly suggested any State's witness gave false or misleading testimony.

4. The prosecutor did not comment on Applicant's failure to testify.

5. The punishment special issues submitted were an adequate vehicle for the jury's consideration of the mitigating evidence Applicant presented.

6. The Texas capital murder sentencing scheme, in which the trial court sentences a capital murder convict based upon the jury's answers to special issues submitted, is constitutionally valid.

Recommendation

This Court recommends to the Court of Criminal Appeals that the Application for Writ of Habeas Corpus by a Person in State Custody, Application for Stay of Execution and Evidentiary Hearing be denied.

SIGNED this 20th day of October, 2000.

/s/ David L. Gleason
David L. Gleason
Judge, 47th District Court

50 S.W.3d 492

Court of Criminal Appeals of Texas.
Ex parte **Brent** Ray **BREWER**, Applicant.
No. 46,587-01.

Jan. 31, 2001.

Appeal from 47th District Court, Randall County, David L. Gleason, Judge.

Rick Keffler, Amarillo, for appellant.

John L. Owen, Special Prosecutor, Amarillo, State's Atty., Austin, for the State.

ORDER

The order was delivered PER CURIAM.

This is a post conviction application for writ of habeas corpus filed pursuant to the provisions of Article 11.071, tex.Code Crim.Proc.

On June 1, 1991, applicant was convicted of the offense of capital murder. The jury answered the special issues submitted pursuant to Article 37.071, tex.Code Crim.Proc., and the trial court, accordingly, set punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Brewer v. State,* No. 71,307 (Tex.Crim.App., delivered June 22, 1994) (nonpublished).

Applicant presents eight allegations in his application in which he challenges the validity of his conviction and resulting sentence. The trial judge entered findings of fact and conclusions of law and recommended that relief be denied.

This Court has reviewed the record with respect to the allegations made by applicant. We adopt the trial judge's findings and conclusions. Based upon the trial court's findings and conclusions and our own review, the relief sought is denied.

PRICE, J., filed a dissenting opinion joined by JOHNSON and HOLCOMB, JJ.

PRICE, J., filed a dissent to the order dismissing the Application, in which JOHNSON and HOLCOMB, JJ., joined.

The applicant alleges that his trial counsel did not provide effective assistance of counsel because counsel failed to request the services of a mental health expert to examine the applicant in preparation for trial. Because I believe that the applicant presents a claim that is – at the very least – worth looking at more closely, and because the majority fails to file and set this case for further review, I dissent.

The test for ineffective assistance of counsel is contained in the Supreme Court's opinion in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Ineffective assistance of counsel is shown when "counsel's conduct so undermined the proper function of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 687, 104 S.Ct. 2052. There are two components to this test: (1) deficient performance and (2) prejudice.

Deficient performance consists of acts or omissions of counsel that are "outside the wide range of professionally competent assistance." *Id.* at 690, 104 S.Ct. 2052. In reviewing the acts and omissions of counsel appellate

courts must be highly deferential. *Id.* at 689, 104 S.Ct. 2052. We must judge counsel's performance from the totality of the representation and not on isolated instances in the record. *Id.*

There are certain minimum standards that counsel must meet, however. In *Ex parte Welborn,* 785 S.W.2d 391 (Tex.Cr.App.1990), we explained that:

> It is evident that a criminal defense lawyer must have a firm command of the facts of the case as well as governing law before he can render reasonably effective assistance of counsel. *Ex Parte Ybarra,* 629 S.W.2d 943, 946 (Tex.Cr.App.1982); *Ex Parte Duffy,* 607 S.W.2d 507, 516 (Tex.Cr.App.1980). A natural consequence of this notion is that counsel has the responsibility to seek out and interview potential witnesses. *Ex Parte Duffy,* 607 S.W.2d at 517. It may not be argued that a given course of conduct was within the realm of trial strategy unless and until the trial attorney has conducted the necessary legal and factual investigation which would enable him to make an informed rational decision. 607 S.W.2d at 526. Counsel has a duty to bring to bear such skill and knowledge as will render the trial a "reliable adversarial testing process." 466 U.S. at 688, 104 S.Ct. at 2065, 80 L.Ed.2d at 694.

Id. at 393 (citations omitted) (emphasis added). In other words the presumption of reasonable trial strategy does not attach *unless and until* counsel has conducted the necessary factual and legal investigation.

The second component of ineffective assistance of counsel is shown when there is a reasonable probability of a different result if counsel had not performed deficiently. *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052. "A reasonable probability is a probability sufficient to

undermine confidence in the outcome." *Id.* Therefore, when counsel's deficient performance undermines our confidence in the outcome of the trial, we must reverse the decision and remand for a new trial.

When the law is applied to the facts of this case, I think that the majority is incorrect in concluding that the applicant has not alleged a meritorious claim. Trial counsel in this capital case failed to procure the services of a mental health expert who could have examined the applicant in preparation for trial. In an affidavit, counsel explained his reasons for not doing so.

> (a) Nothing about the Applicant's behavior caused suspicion about his mental health status;
>
> (b) Under then-controlling law, a mitigation special issue on punishment could be submitted only when: (1) the accused had a limited intellectual functioning or brain defect; and (2) that condition had a proven nexus with his commission of the crime so as to reduce his moral blameworthiness. The predicate for the punishment mitigation special issue was absent in this case. The Court advised Daffern [counsel] at trial that a punishment mitigation special issue would not be given.
>
> (c) Presenting expert psychiatric and psychological evidence could be a "double edged sword" in that negative information about Applicant could be exposed and exploited by the prosecution. Possibly the jury would consider such evidence adversely to Applicant in answering the "future danger" punishment special issue[.]

Findings of Fact and Conclusions of Law, *Ex parte Brewer,* No. 46,587-01. These reasons do not justify the complete

failure to investigate the applicant's mental condition in preparation for trial.

Trial counsel claims that nothing about the applicant's behavior caused suspicion about his mental health status, but the applicant had been committed to a mental hospital for severe depression only three months before the instant offense occurred. This is sufficient to alert trial counsel that there may have been some mental health issues. Moreover, the Supreme Court in *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), explained that when the defendant's mental condition is relevant to his guilt and punishment, "the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal a defense." *Id.* at 80, 105 S.Ct. 1087. This is especially true in a capital case when the jury decides whether the defendant will live or die based on its answers to questions about the deliberateness with which the defendant committed the offense and the defendant's potential for future dangerousness. *See id.* at 83-84 & 86-87, 105 S.Ct. 1087.

In his second and third reasons for not hiring a mental health expert, counsel cites concerns about whether he could get a mitigation instruction from the trial judge and whether the evidence of the appellant's mental health condition would have been double-edged. But how does counsel know whether there is a legitimate basis for requesting a mitigation instruction or if there is double-edged evidence if he has not had the applicant examined? There is no indication from the record that trial counsel was, himself, a mental health expert who was capable of making such determinations. For these purposes, counsel was a layperson and should have relied on someone with mental health expertise. Also, an offer of proof about the applicant's mental condition could have

served as the basis for a claim on appeal had the trial judge erroneously denied a mitigation instruction in the jury charge.

The most compelling reason for finding trial counsel's performance deficient is that mental health evidence is useful beyond a mitigation special issue. The jury did receive instructions on future dangerousness and the deliberateness with which the offense was committed. And an expert can assist trial counsel in challenging the State's experts during the punishment phase. If the examination had revealed negative evidence that would have been harmful to the applicant and not helpful, then trial counsel could have decided not to present that evidence at trial. That would have prevented the State's exploitation of the evidence. But by deciding before an investigation, trial counsel made an uninformed decision that a majority of this Court endorses with its decision.

Prejudice results from counsel's deficient performance when the deficient performance is sufficient to undermine the outcome of the trial. The result of an examination of the applicant after his trial demonstrates prejudice.

Dr. Mark Cunningham, a board certified forensic psychologist examined the applicant in 1996. His conclusions after examining the applicant, conducting interviews with third parties, and reviewing the applicant's history are as follows:

> 1. It is unlikely that Brent's [applicant's] conduct in the offense was committed deliberately as this terms [sic] is defined in the Jury Instructions. His psychological, emotional, and interpersonal deficits at the time of the offense represented an active impediment to "careful and

thorough consideration; characterized by awareness of the consequences; willful, slow, unhurried, and steady as though allowing time for decision."[1]

2. The probability that Brent would engage in future acts of criminal violence that would constitute a continuing threat to society while in prison is considered to be quite low. (1.61 offenses per 100 capital offenders per year). Further, this probability is substantially less than that represented by inmates systemwide in the Texas prison system. Brent would not, then, be expected to be a disproportionate risk of violence in prison.

The probability that Brent would commit future acts of criminal violence that would constitute a continuing threat to society if paroled after serving a capital life sentence is also considered to be low.

3. The techniques and research literature necessary to reach the above conclusions were available in May 1991 at the time of Brent's trial.

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[1] At the time of the applicant's trial the special issues were:

(1) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result.

(2) Whether there was a reasonable probability that the defendant would commit criminal acts of violence that would constitute s continuing threat to society.

Deliberately was defined as "a manner of doing an act characterized by or resulting from careful and thorough consideration; characterized by awareness of the consequences; willful, slow, unhurried, and steady as though allowing time for decision."

Application for Appellant, Exhibit 1, *Psychological Evaluation of Factors relevant to Capital Sentencing,* at 47, *Ex parte Brewer,* No. 46, 587-01.

Evidence that was highly relevant to the special issues and that could have been presented at trial was available. Dr. Cunningham's conclusions were not based on a mitigation special issue, but on the special issues that actually were presented to the jury in the applicant's trial. The jury did not have the benefit of this evidence when it decided the special issues. I think the majority is wrong to not grant the relief requested and, especially, to not file and set this ground for review for briefs and a closer look by the entire Court.

Although the applicant's trial counsel failed to develop and present evidence that was relevant to the special issues that the jury used to sentence the applicant to death, the majority puts its stamp of approval on the applicant's death sentence without further inquiry. Counsel's omission undermines confidence in the result of the punishment phase of the applicant's trial. I dissent.

2004 WL 1732312

United States District Court,
N.D. Texas, Amarillo Division.
Brent Ray **BREWER**, Petitioner,
v.
Douglas DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Defendant.
No. Civ.A.2:01-CV-0112-J.

Aug. 2, 2004.

Michael D. Samonek, Law Office of Michael D. Samonek, Dallas, TX, Rick Keffler, Law Office of Richard A. Keffler, Amarillo, TX, for Petitioner.

Edward L. Marshall, Office of the Texas Attorney General, Austin, TX, for Respondent.

Governor of Texas, Office of the Governor, Austin, TX, pro se.

Attorney General, State of Texas, Austin, TX, pro se.

Director Texas Department of Corrections, Director Texas Department of Criminal Justice, Huntsville, TX, pro se.

Warden TDCJ, Huntsville, TX, pro se.

Clerk of US Court of Appeals, New Orleans, LA, pro se.

Clerk Supreme Court, Supreme Court of the United States, Office of the Clerk, Washington, DC, pro se.

Governor, Austin, TX, pro se.

Attorney General of Texas, Austin, TX, pro se.

* * Capital Litigant * *

ROBINSON, J.

MEMORANDUM OPINION AND ORDER CONDITIONALLY GRANTING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, Brent Ray Brewer, an inmate in the custody of the Texas Department of Criminal Justice, Correctional Institutions Division, was convicted by a jury and sentenced to death for the 1990 capital murder of Robert Doyle Laminack.[1] Petitioner filed this petition for writ of habeas corpus pursuant to Title 28, United States Code, Section 2254.[2] Additional briefing was ordered by the Court following the Supreme Court's recently clarified standards affecting certain death penalty cases in *Tennard v. Dretke*, ___ U.S. ___, 124 S.Ct. 2562, 159 L.Ed.2d 384,

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[1] *State v. Brewer*, No. 6,997-A (47th Dist. Ct., Randall County, Tex. June 1, 1991). The case was appealed to the Texas Court of Criminal Appeals, which affirmed the conviction and death sentence. *Brewer v. State*, No. 71,307 (Tex.Crim.App.1994) (unpublished). Petitioner filed a petition for writ of certiorari to the Supreme Court, which was denied on March 20, 1995. *Brewer v. Texas*, 514 U.S. 1020, 115 S.Ct. 1367, 131 L.Ed.2d 223. Petitioner subsequently filed a state application for writ of habeas corpus on April 23, 1997. The trial court entered findings of fact and conclusions of law and recommended that relief be denied on October 20, 2000. *Ex parte Brewer*, No. W-6,997-A-1 (47th Dist. Ct., Randall County, Tex.) The Court of Criminal Appeals adopted those findings of fact and conclusions of law and denied relief in a written order on January 31, 2001. *Ex parte Brewer*, 50 S.W.3d 492 (Tex.Crim.App.).

[2] Petitioner filed his original federal petition for writ of habeas corpus on May 7, 2001, and his amended petition for writ of habeas corpus on September 30, 2002. Respondent filed an answer with brief in support on June 28, 2001, and furnished the state court records. Respondent did not file an amended answer in response to the amended petition.

2004 WL 1402731 (June 24, 2004). Applying those standards, the Court concludes that there was constitutional error in the penalty phase of the trial in which the jury answered the two questions presented to it, known as special issues, in a way that mandated the death penalty. The special issues asked of the jury did not give the jury a vehicle to give effect to the mitigating evidence presented at the trial.

I.

FACTUAL BACKGROUND

On April 26, 1990, Petitioner and Kristie Lynn Nystrom convinced Robert Laminack to give them a ride to the Salvation Army, and Petitioner rode in the back seat of Laminack's truck. After traveling approximately one block, Petitioner stabbed Laminack several times in the neck while Nystrom held the victim's right arm to prevent him from fighting back. Petitioner and Nystrom then took the victim's wallet and approximately $140.00 in cash.

At trial, witnesses testified that Petitioner was emotionally and physically abused by his father, that he suffered severe depression, and that just three months before the murder, Petitioner was committed to a psychiatric hospital where he fell under the influence of his co-defendant who dominated and manipulated him.

Petitioner did not know his father until he was fifteen years old. After his father, Albert, reconciled with Petitioner's mother, Karon, Albert abused both Karon and Petitioner. Karon testified that Albert hit Petitioner numerous times with items such as the butt of a pistol, a flashlight, and his fists. During one episode, Albert tried to hit Petitioner with a stick of firewood. When Albert went

outside to get the firewood, Karon slammed the front door and locked it. After Albert busted the glass out of the front door with the firewood, Karon called the police and Albert was arrested.

Petitioner witnessed the physical abuse of his mother by his father. Petitioner would get between his parents. At one point, Albert, a Vietnam veteran who suffers from post-traumatic stress disorder and depression, stated, "If your (sic) ever draw your hand back, you'd better kill me, because I'll kill you." There followed a violent confrontation with his son that landed Albert in the hospital. In his testimony, Albert conceded that Petitioner was only seeking to protect his mother by getting into a fight between Albert and Karon and stopping Albert's attack, which included throwing chairs at Karon. Albert acknowledged that the incident was his fault and that he needed to be stopped. He testified that Petitioner was distraught over the injuries which he had caused his father. Despite the testimony by Albert, the prosecution used this incident in its closing argument as an example of how Petitioner might pose a continuing threat to society.

Petitioner became severely depressed and just three months before the murder of Robert Laminack he was involuntarily committed to a psychiatric hospital after making suicide threats. While undergoing treatment, Petitioner met Kristie Nystrom, a topless dancer who was three years his senior and a patient in the hospital. He became obsessed with Nystrom. After being discharged from the hospital, Petitioner continued to have a romantic relationship with Nystrom and lived with her. Several witnesses testified that Petitioner, who was 19 years old at the time of the offense, was dominated and controlled by Nystrom – that Nystrom had some kind of hold over him.

One witness testified that the murder was Nystrom's idea and described Nystrom as a person who controlled situations and dominated Petitioner. Another witness testified that Petitioner would do whatever Nystrom wanted him to do.

Petitioner's trial counsel submitted no fewer than seven proposed instructions designed to give effect to mitigating evidence. Most of them were designed to make use of the two special issues mandated by state law. However, one included an entirely separate proposed special issue on mitigation evidence. Each of these requests was denied.

During closing argument, Petitioner's trial counsel urged the jury to consider the effect of its answers to the special issues, and attempted to fit the evidence into those issues despite the absence of an instruction on mitigating evidence. The prosecution then argued that the jury does not "have the power to say whether [Petitioner] lives or dies. You answer the questions according to the evidence, must (sic) like you did at the guilt or innocence. That's all. It's not a matter of life and death." Following an admonition by the prosecutor to not deliver a "sympathetic verdict," the jury retired to deliberate.

On state habeas review, the trial court found that delving into additional mitigating evidence would have had a "double edged sword" effect. In other words, exploration of additional mitigating evidence may have had only an aggravating effect. Despite the apparent awareness of this dilemma, the trial court continued to assert that a mitigating evidence instruction was not necessary.

II.

STANDARD OF REVIEW

The standard of review in federal habeas proceedings is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d), which provides, in pertinent part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in a State court proceeding.

Because the petition in this case was filed after April 24, 1996, the above-cited provision of the AEDPA applies to those claims that were adjudicated on the merits. *Lindh v. Murphy,* 521 U.S. 320, 326-27, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997). "Resolution on the merits" in the habeas corpus context is a term of art that refers to the state court's disposition of the case on substantive rather than procedural grounds. *Green v. Johnson,* 116 F.3d 1115, 1121 (5th Cir.1997).

Section 2254(d)(1) concerns pure questions of law as well as mixed questions of law and fact. *Martin v. Cain,* 246 F.3d 471, 475 (5th Cir.2001), *cert. denied,* 534 U.S.

885, 122 S.Ct. 194, 151 L.Ed.2d 136 (2001). Under the "contrary to" clause, a federal habeas court may grant the writ of habeas corpus if the state court arrives at a conclusion opposite to that reached by the United States Supreme Court on a question of law or if the state court decides a case differently from the United States Supreme Court on a set of materially indistinguishable facts. *Williams v. Taylor,* 529 U.S. 362, 412-13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). With respect to the "unreasonable application" clause, a federal court may grant a writ of habeas corpus if the state court identifies the correct governing legal principle from the United States Supreme Court's decisions, but unreasonably applies that principle to the facts of the prisoner's case. *Id.* Under *Williams,* a state court unreasonably applies Supreme Court precedent if it "unreasonably extends a legal precedent from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.*

Section 2254(d)(2) concerns questions of fact. *See Moore v. Johnson,* 225 F.3d 495, 501, 504 (5th Cir.2000), *cert. denied,* 532 U.S. 949, 121 S.Ct. 1420, 149 L.Ed.2d 360 (2001). Under § 2254(d)(2), federal courts must give deference to state court findings unless they were "based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." *Chambers v. Johnson,* 218 F.3d 360, 363 (5th Cir.2000) (as modified on denial of rehearing), *cert. denied,* 531 U.S. 1002, 121 S.Ct. 508, 148 L.Ed.2d 473 (2000). The resolution of factual issues by the state court is presumptively correct and will not be disturbed unless the prisoner rebuts the presumption by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1).

III.

EXAMINATION OF THE ISSUE WARRANTING RELIEF

A. Failure to Properly Instruct the Jury on Mitigation

In his sixth claim for relief, Petitioner complains that the trial court's refusal to allow a special issue or instruction on mitigating evidence violated his rights under the Eighth and Fourteenth Amendments. This claim was argued to the trial court, the Texas Court of Criminal Appeals, and again during the state habeas proceedings and is therefore properly before this Court.

The trial court instructed the jury in accordance with Art. 37.071 of the Texas Code of Criminal Procedure (Vernon 1991) as follows:

> Special issue No. 1
>
> Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant, BRENT RAY BREWER, that caused the death of the deceased, Robert Doyle Laminack, was committed deliberately and with the reasonable expectation that the death of the deceased would result?
>
> Special issue No. 2.
>
> Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, BRENT RAY BREWER, would commit criminal acts of violence that would constitute a continuing threat to society?

Before trial, Petitioner's attorney filed a number of motions for instructions and a special issue to give effect to mitigating evidence. In light of the Supreme Court's

decision in *Tennard,* the jury should have been instructed on mitigating evidence.

In *Jurek v. Texas,* 428 U.S. 262, 272, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), the Supreme Court upheld the Texas statutory special issues in the punishment phase of capital trials upon the premise that these special issues would be construed broadly enough to include proper mitigation evidence.[3] However, in *Penry v. Lynaugh,* 492 U.S. 302, 322, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) (*"Penry I"*), the Supreme Court held that the two special issues alone were inadequate to allow the sentencing jury a vehicle to give effect to the mitigating evidence admitted regarding Penry's mental retardation and severe child abuse.

Following *Penry I,* the Fifth Circuit Court of Appeals developed a two-part test for determining whether a defendant's evidence requires a special mitigation instruction: "We 'must determine (1) that the proffered evidence was constitutionally relevant mitigating evidence, and, if so, (2) that the proffered evidence was beyond the 'effective reach' of the jurors.'" *Smith v. Cockrell,* 311 F.3d 661, 680 (5th Cir.2002), *cert. dism'd, Smith v. Dretke,* ___ U.S. ___, 124 S.Ct. 1652, 158 L.Ed.2d 263 (2004) (quoting *Madden v.*

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[3] In *Jurek,* the Supreme Court observed that "the Texas statute does not explicitly speak of mitigating circumstances" in the special issues submitted to the jury. The Court further stated,

> The Texas Court of Criminal Appeals has yet to define precisely the meanings of such terms as "criminal acts of violence" or "continuing threat to society." In the present case, however, it indicated that it will interpret this second question so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show.

Jurek, 428 U.S. at 272.

Collins, 18 F.3d 304, 308 (5th Cir.1994)). Whether certain evidence qualified as "constitutionally relevant" mitigating evidence depended on whether the criminal act was "due to the uniquely severe permanent handicaps with which the defendant was burdened through no fault of his own." *Graham v. Collins,* 950 F.2d 1009, 1029 (5th Cir.1992) (en banc), *aff'd on other grounds,* 506 U.S. 461, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993). In order to determine whether the evidence in question rose to that level, courts considered four inquiries corresponding to "four principles found in *Penry I:* voluntariness, permanence, severity, and attribution. Did the defendant acquire his disability voluntarily or involuntarily? Is the disability transient or permanent? Is the disability trivial or severe? Were the criminal acts a consequence of this disability?" *Robertson v. Cockrell,* 325 F.3d 243, 251 (5th Cir.2003) (en banc), *cert. denied,* 539 U.S. 979, 124 S.Ct. 28, 156 L.Ed.2d 691 (2003).

The Supreme Court's *Tennard* decision rejected the Fifth Circuit's application of *Penry.* Tennard presented evidence at his trial that he had an IQ of 67. The trial court did not instruct the jury on mitigating evidence and Tennard was sentenced to death. The federal district court denied Tennard's habeas petition on the *Penry* issue and denied a certificate of appealability. The Fifth Circuit affirmed the denial of a certificate of appealability in light of its *Penry* jurisprudence. The Supreme Court reversed, holding that Tennard was entitled to a certificate of appealability and clarifying the standards for the application of *Penry.*[4]

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[4] Respondent does not argue that Petitioner's claim is barred by the non-retroactivity doctrine discussed *infra,* Sec. IV(A). Any such argument would be without merit. *Tennard* was a clarification of *Penry,*

(Continued on following page)

The first question addressed in *Tennard* is the relevance of mitigating evidence. ___ U.S. ___, ___, 124 S.Ct. 2562, 159 L.Ed.2d 384, ___, 2004 WL 1402731, *7-*8. "'Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.'" *Id.* at *8 (quoting *McKoy v. North Carolina,* 494 U.S. 433, 440, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990)). The evidence Petitioner presented at trial – his abused childhood, his severe depression, his involuntary commitment shortly before the murder, and his domination by Kristie Nystrom – fits within this expansive definition. This evidence is the sort that "might serve 'as a basis for a sentence less than death.'" *Id.* (quoting *Skipper v. South Carolina,* 476 U.S. 1, 5, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986)).

The special issues presented to the jury in Petitioner's trial tracked the same language that was used in the trials of Tennard and Penry. *Id.* at *3-*4. In both cases, the petitioners presented relevant mitigating evidence. In *Penry I,* the Supreme Court concluded that those special issues were an inadequate vehicle for the jury to give effect to that relevant mitigating evidence. *Id.* at *4. The same is true in Petitioner's case. Respondent argues that evidence of treatable mental illness or drug abuse is within the scope of the special issues presented to the jury. This may be true where there are issues of impulse control

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a case already decided at the time of Petitioner's trial. Moreover, whether an individual is entitled to a jury instruction on mitigating evidence implicates the exceptions to the non-retroactivity doctrine. *See Penry I,* 492 U.S. at 330; *Bell v. Cockrell,* 310 F.3d 330, 331-32 (5th Cir.2002).

that could be characterized as going to deliberateness. The evidence presented by Petitioner does not fall in this category. The other possibility is future dangerousness. Again, the evidence at Petitioner's trial does not fit squarely there either. One could view the evidence as either aggravating or mitigating. Without the guidance of a proper instruction from the court, the jury was not given an opportunity to consider it as mitigating.

The mitigating evidence presented may have served as a basis for mercy even if a jury decided that the murder was committed deliberately and that Petitioner posed a continuing threat. Without an instruction, much less a special issue on mitigation, this evidence was out of the jury's reach. Given the nature of the mitigating evidence before the jury and the lack of any instruction on mitigation, there is a reasonable likelihood that the jury applied its instructions in a way that prevented the consideration of the mitigating evidence. Reviewing the evidence in light of the special issues, a jury would be very hard pressed to see the evidence presented as anything but aggravating. Failure to submit an instruction on mitigation evidence was an unreasonable application of federal law and Supreme Court precedent. Accordingly, habeas relief on this issue is conditionally granted.

IV.

EXAMINATION OF THE OTHER ISSUES PRESENTED

In his amended petition, Petitioner raises eight broad issues in ten claims for relief: ineffective assistance of counsel, newly discovered evidence of actual innocence, suppression of exculpatory evidence, improper jury argument by the

prosecutor, denial of a mitigation instruction at the punishment phase of his trial, misleading jury instructions regarding the procedure for assessing death sentence, complaints against the federal habeas-corpus process, and cumulative error. Petitioner also contends that he is entitled to discovery and an evidentiary hearing.

In his answer to the original petition, Respondent stated that the claims raised in the petition appeared to have been exhausted. Therefore, he did not request that any of those claims be dismissed or denied on exhaustion grounds. However, Respondent has not affirmatively waived this requirement, 28 U.S.C. § 2254(b)(3), nor has he addressed the new claims raised in the amended petition.

Having considered the one issue that merits relief, the Court will briefly address the other issues presented. These other issues are either not properly before the Court or lack merit.

A. Non-Retroactivity

Petitioner's second claim for relief asserts that there is newly discovered evidence that Petitioner did not cause Mr. Laminack's death and that due process requires consideration of that evidence. Petitioner's seventh claim is that his Sixth Amendment right to trial by jury was violated by the state statutory scheme of special issues because it misleads the jury about their responsibility in making the determination to assess the death sentence. Respondent asserts that Petitioner's second and seventh claims are barred under the federal non-retroactivity doctrine announced in *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). "A threshold issue in

every case is . . . whether the court is obligated to apply the *Teague* rule to the defendant's claim." *See Caspari v. Bohlen,* 510 U.S. 383, 389, 114 S.Ct. 948, 127 L.Ed.2d 236 (1994). Therefore, this Court will address these issues before considering the merits of any claim.

This Circuit has applied a three-step test to determine whether a claim is *Teague*-barred:

> (1) we determine when [Petitioner's] conviction and sentence became final, (2) we "survey the legal landscape as it then existed to determine whether a state court considering [Petitioner]'s claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks was required by the Constitution[,]" and (3) if [Petitioner] seeks the benefit of a new rule, we must decide whether the rule falls within one of the narrow exceptions to the non-retroactivity principle.

Burdine v. Johnson, 262 F.3d 336, 341 (5th Cir.2001) (quoting *Caspari,* 510 U.S. at 390), *cert. denied, Cockrell v. Burdine,* 535 U.S. 1120, 122 S.Ct. 2345, 153 L.Ed.2d 173 (2002). The Supreme Court has recognized two exceptions to this principle. The first is for new rules that place certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe. *See Teague,* 489 U.S. at 307; *Caspari,* 510 U.S. at 396. The second is for watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. *Saffle v. Parks,* 494 U.S. 484, 495, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990); *Caspari,* 510 U.S. at 396. The Fifth Circuit Court of Appeals has "held that unless the Supreme Court has clearly established that the new rule falls within one of

the exceptions to the non-retroactivity principle of *Teague,* . . . that new rule could not be considered with regard to petitions governed by the AEDPA." *Cockerham v. Cain,* 283 F.3d 657, 660 (5th Cir.2002) (citations omitted).

In his second claim, Petitioner contends that due process requires the consideration of newly discovered evidence that he did not actually cause the death of the victim. He asserts that this new evidence proves that Nystrom actually stabbed the victim, causing his death. Respondent asserts that Petitioner's argument would extend the protections of the Due Process Clause beyond the perimeters drawn by the Supreme Court, and is, therefore, *Teague*-barred. This Court agrees.

Petitioner incorrectly relies upon *Herrera v. Collins,* 506 U.S. 390, 400, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). In *Herrera,* the Supreme Court stated that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." Petitioner contends that newly discovered evidence he presents in his petition challenges the validity of the jury's answers to the special issues. This claim is unsupported by existing federal law, and does not come within any exception established by the Supreme Court. Therefore, Petitioner's second claim is barred by the non-retroactivity doctrine.

In his seventh claim, Petitioner contends that his Sixth Amendment right to trial by jury was violated by the state statutory scheme of special issues that mislead the jury about their responsibility in making the determination to assess the death sentence. He relies upon *Caldwell v. Mississippi,* 472 U.S. 320, 328-29, 105 S.Ct. 2633, 86

L.Ed.2d 231 (1985), which states that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been lead to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." The Supreme Court found that the prosecutor's argument (urging the jury not to view itself as determining whether the defendant would die because the death sentence would be reviewed for correctness by the state supreme court) affirmatively mislead the jury about this critical jury function. However, Petitioner does not allege any affirmative statement in his case that mislead the jury in any way.[5] Instead, he relies solely on the fact that special issues were used instead of a verdict containing the option of an actual sentence of death.

The prohibitions of *Caldwell* do not extend to the sentencing procedure used in Petitioner's trial. In fact, this type of sentencing procedure has been expressly upheld by the Supreme Court. *See Jurek v. Texas,* 428 U.S. 262, 273-76, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). To now hold otherwise would require a new rule in violation of *Teague.* Accordingly, Petitioner's seventh claim is barred. The Court notes, however, that the comments made by the prosecutor during his final argument in the punishment

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[5] Although Petitioner's claim is limited to the use of special issues, the Court notes that *Caldwell* was clarified in *Dugger v. Adams,* 489 U.S. 401, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989), which held that "[t]o establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." 489 U.S. at 407. Therefore, even if Petitioner were to have directed this Court to any portion of the prosecutor's argument to the jury, that argument would not have violated *Caldwell* unless it was also inconsistent with Texas law.

phase of the trial compounded the error of not giving a mitigating instruction. The prosecutor told the jury that, "Contrary to what Mr. Daffern would have you believe, I don't have the power to say whether he lives or dies. You don't have the power to say whether he lives or dies. You answer the questions according to the evidence, mu[ch] like you did at the guilt or innocence. That's all. It's not a matter of life and death. It's whether it was deliberate. Was this act deliberate? Will he continue to commit violent acts? That's all you answer. And every one of you people told me you would base that not upon the result, but upon what the evidence dictates you must do." This line of argument was a major theme in the prosecution's closing. Although this argument does not rise to the level of *Caldwell* error, the jury was led to believe that it could not consider in mitigation evidence presented at trial.

B. Claims Not Cognizable

In his amended petition, Petitioner adds two new complaints against the federal habeas corpus process. In his eighth and ninth claims, Petitioner complains of rulings of the United States Magistrate Judge regarding the appointment of counsel, experts, and investigators, and regarding the prohibition against adding new claims in his amended petition. The Court previously addressed these claims when Petitioner appealed the rulings of the Magistrate Judge to this Court. After denial of Petitioner's appeal, Petitioner appealed this Court's order denying the appeal to the Fifth Circuit. On January 10, 2003, this Court denied a certificate of appealability, and the Fifth Circuit dismissed Petitioner's appeal for want of jurisdiction on February 5, 2003. *Brewer v. Cockrell,* No. 02-11310 (5th Cir.) (unpublished). It is unnecessary to further

review these new claims as part of Petitioner's habeas corpus petition because they are not cognizable on federal habeas corpus review.

This court may "entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). To the extent Petitioner is presenting his claims against the federal habeas corpus proceeding as independent claims for relief, they constitute attacks on proceedings collateral to the detention and not the detention itself. *See Millard v. Lynaugh,* 810 F.2d 1403, 1410 (5th Cir.), *cert. denied,* 484 U.S. 838, 108 S.Ct. 122, 98 L.Ed.2d 81 (1987). Accordingly, Petitioner's eighth and ninth claims for relief are denied as not cognizable grounds for relief in this proceeding.

Although Petitioner's eighth and ninth claims are denied as not cognizable, the Court notes that they are without merit as well. Petitioner has improperly characterized a denial of funds for further investigative or expert assistance on federal habeas review as a violation of a constitutional right. *See Barraza v. Cockrell,* 330 F.3d 349, 352 (5th Cir.2003) (the statutory requirement for habeas counsel does not create a constitutionally-secured right), *cert. denied,* 540 U.S. 951, 124 S.Ct. 389, 157 L.Ed.2d 283 (2003). The Court also notes that Petitioner has not shown that the development of such new evidence would not be barred. *See Riley v. Dretke,* 362 F.3d 302, 307-08 (5th Cir.2004) (petitioner cannot show entitlement to investigate claim which is procedurally barred from review). Therefore, this Court correctly refused to fund an investigation not shown to be reasonably necessary. *See* 21 U.S.C. § 848(q)(4)(9).

With respect to Petitioner's complaint regarding adding new claims to his amended petition, Petitioner has shown no prejudice. Each of Petitioner's new claims would have been barred because they were unexhausted at the state level. 28 U.S.C. § 2254(b)(1)(A); *Martinez v. Johnson,* 255 F.3d 229, 238-39 (5th Cir.2001). Petitioner has also failed to show good cause for this failure, a requirement to overcome the procedural bar. *Id.*

Although there was some delay in appointing co-counsel on this case, Petitioner fails to demonstrate that this delay resulted in any prejudice.[6] The Magistrate Judge granted numerous deadline extensions and Petitioner was afforded the opportunity to amend his petition after co-counsel had ample time to review the case.

C. Ineffective Assistance of Counsel

In his first and fifth claims for relief, Petitioner contends that his right to the effective assistance of counsel was violated (1) by the failure of his trial counsel to seek and utilize available expert psychiatric/psychological assistance in developing mitigating evidence for the punishment phase of his trial, and (2) by the failure

[6] Petitioner's original counsel on his federal habeas petition was Mr. Rick Keffler. Mr. Keffler served as Petitioner's attorney at the state habeas level and filed a so-called "skeletal" habeas petition in this Court. That original petition mimicked the petition filed at the state habeas level, thus including all claims that were exhausted. Although Mr. Keffler complained of his inexperience and lack of knowledge with federal habeas proceedings, U.S. Magistrate Judge Clinton Averitte found good cause to appoint Mr. Keffler to this case. There is no indication that Mr. Keffler was not competent or that he has handled the proceedings in this Court in any way that would be prejudicial to his client.

of his appellate counsel to raise as error on appeal the prosecutor's comment during final argument regarding Petitioner's lack of remorse. These claims are denied.

The Sixth Amendment guarantees a defendant the right to the effective assistance of counsel. The two-pronged standard by which a claim of ineffective assistance of counsel is measured is set forth in *Strickland v. Washington,* 466 U.S. 668, 698, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The first prong of *Strickland* requires the defendant to show that counsel's performance was deficient. *Strickland,* 466 U.S. at 698. To prove deficiency, a defendant "must show that counsel's performance fell below an objective standard of reasonableness." *Id.* at 687-88. This requires a showing that the errors made by his counsel were so serious that his counsel was not functioning as the counsel guaranteed by the Sixth Amendment. *Id.* at 687. This Court must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance or sound trial strategy. *Id.* at 668, 688-89. Judicial scrutiny of counsel's performance must be highly deferential and every effort must be made to eliminate the distorting effects of hindsight. *Id.* at 689.

The second prong of this test requires the defendant to show prejudice by demonstrating that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* The court need not address both prongs of the *Strickland* standard if the complainant has made an insufficient showing on one. *Id.* at 697.

In his first claim for relief, Petitioner alleges that his trial counsel was ineffective in the investigation and presentation of mitigating evidence in the punishment phase of his trial. The Supreme Court recently discussed the standard for evaluating this claim. In *Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), the Court held that a "borderline" mentally-retarded habeas petitioner was denied his Sixth Amendment right to counsel when his attorney failed to investigate the petitioner's background and present mitigating evidence of his unfortunate life history at his capital murder trial. Petitioner has not identified any such evidence that was neglected in his case.

Although Petitioner contends that his trial counsel failed to investigate and present mitigating evidence, his petition makes no mention of any facts in Petitioner's life history that were not presented during his trial. Instead, he appears to rely entirely upon the fact that trial counsel did not present an expert psychological evaluation of Petitioner as mitigation evidence. This is not sufficient to show ineffective assistance. The principal concern in deciding whether Petitioner's trial counsel exercised reasonable professional judgment is not whether counsel should have presented a mitigation case. *See Wiggins,* 539 U.S. at ___, 123 S.Ct. at 2536. Instead, the focus of the inquiry is whether the investigation supporting counsel's decision not to introduce the potentially mitigating evidence of Petitioner's background was itself reasonable. *Id.*

The information available to trial counsel was sufficient to make a reasoned professional judgment in this matter. Although not mental health professionals, trial counsel had access to records of Petitioner's recent commitment and the mental health professionals who had

recently evaluated and treated him. Further, trial counsel's own observations of Petitioner did not indicate that there was anything to be gained from another evaluation. Also, trial counsel did obtain and present expert psychological testimony during the punishment phase of Petitioner's trial. A careful review of the affidavit of the psychiatrist attached to his petition reveals that any truly significant facts underlying the psychiatric opinions presented therein had already been presented in Petitioner's trial.

Petitioner's current psychiatrist identifies historical facts along with his own psychological testing in support of his evaluation and opinions. This testing was described as "problematic" and revealed malingering. These factors, along with the intervening years on death row, tended to undermine the reliability of these test results concerning Petitioner's state of mind before the offense or trial. In the opinion of this psychiatrist, Petitioner suffered from moderate attention deficit hyperactivity disorder, moderate polysubstance dependence, anxiety, major depression, and dysthymia during the time period of the offense and trial. These diagnoses had already been reflected in Petitioner's mental health records from Big Spring State Hospital, which were available and apparently known to Petitioner's trial counsel.

The strategy of Petitioner's attorneys regarding this matter was clear from the record: They did not want to give the state any excuse to evaluate Petitioner in order to prove his future dangerousness. What the prosecution lacked in evidence of a violent criminal history, Petitioner's trial counsel did not want to provide in expert psychiatric evaluation. On habeas review, the state trial court found that an expert evaluation could be "a double

edged sword" in that negative information about Petitioner could be exposed and exploited by the prosecution. This Court must review the trial strategy of Petitioner's trial counsel with deference, particularly due to the double-edged nature of pursuing expert evaluations. *See Burger v. Kemp,* 483 U.S. 776, 789-94, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987) (uninvestigated evidence not uniformly helpful because it suggested violent tendencies at odds with the defense strategy); *Darden v. Wainwright,* 477 U.S. 168, 184-86, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (any attempt to portray petitioner as nonviolent would have opened the door to potentially damaging prosecution evidence).

Trial counsel was not facing an idle danger. The prosecution clearly sought to use psychiatric evidence against Petitioner. The prosecutors concluded their entire punishment case with expert psychiatric testimony, trying to use that evidence to carry their burden of proving that Petitioner was a future danger. In this, they were apparently hampered by their inability to have their expert examine Petitioner due to defense counsel's strategy to avoid developing such evidence. As a result, the prosecution's expert testimony was vulnerable to defense counsel's final argument that the prosecution's expert psychiatrist lacked critical information and did not even examine the defendant before testifying to his opinions. This shows the wisdom of trial counsel's strategy, even if it was not entirely successful.

Trial counsel's strategy was supported by a reasonable investigation. Petitioner concurred with trial counsel's advice that developing expert psychological or psychiatric evidence would not be in his best interest. The state habeas court found that Petitioner's trial counsel made a

reasoned, professional judgment to not develop expert psychiatric or psychological punishment evidence. This finding has not been shown incorrect by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1).

In his fifth claim for relief, Petitioner complains of appellate counsel's decision not to raise as error on appeal the prosecutor's comment on Petitioner's lack of remorse as a comment on his failure to testify at the punishment phase of the trial. Appellate counsel's performance on appeal is judged under the same two-pronged standard set forth above in *Strickland v. Washington*. *See* 466 U.S. at 698; *Smith v. Robbins,* 528 U.S. 259, 286, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000); *Briseno v. Cockrell,* 274 F.3d 204, 207 (5th Cir.2001).

Petitioner's claim does not satisfy either prong of *Strickland*. The prosecutor's argument did not violate Petitioner's rights under the Fifth Amendment. As set out more fully in Section E below, this argument does not appear intended or understood as a comment on his failure to testify, but upon his actions and comments before the trial and his demeanor displayed to the jury during the trial. *See Jackson v. Johnson,* 194 F.3d 641, 652 (5th Cir.1999). Further, there was no objection made at the time to this argument. The decision to not raise such a claim on appeal did not constitute deficient representation under the United States Constitution.[7]

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[7] Although Petitioner appears to rely entirely upon his appellate counsel's failure to raise the alleged constitutional violation, Petitioner also cites *Dickenson v. State,* 685 S.W.2d 320, 322-23 (Tex.Crim.App.1984), which holds that certain prosecutorial arguments can violate a state statute: Art. 38.22 of the Texas Code of Criminal Procedure. Without considering Respondent's contention that this claim is waived, this

(Continued on following page)

None of the allegations of ineffective assistance of counsel are sufficient to establish a right to habeas corpus relief. Accordingly, Petitioner's first and fifth claims for relief are denied.

D. Exculpatory Information

In his third claim for relief, Petitioner contends that the prosecution withheld exculpatory evidence from him in violation of the Fifth and Fourteenth Amendments. Specifically, Petitioner complains of the failure to disclose information concerning a prior statement of Skee Callen and concerning the background and credibility of the state's pathologist.

The "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct.

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state-law matter has been determined by the state courts not to have been violated.

Federal courts in post-conviction habeas corpus proceedings do not sit to review questions of state law. *See Engle v. Isaac,* 456 U.S. 107, 119-21, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); *see also Johnson v. Cain,* 215 F.3d 489, 494 (5th Cir.2000) (referring to "the longstanding principle that federal courts do not sit to review questions of state law."); *Dickerson v. Guste,* 932 F.2d 1142, 1145 (5th Cir.1991) ("We will not review a state court's interpretation of its own law in a federal habeas corpus proceeding"), *cert. denied,* 502 U.S. 875, 112 S.Ct. 214, 116 L.Ed.2d 172 (1991). Even if Petitioner means to contend that his attorney failed to complain of a violation of state law, the state court determined that no such state-law violation occurred. Therefore, the attorney's conduct was not considered deficient regarding this state-law matter, and this Court should not conclude otherwise in order to find any deficient representation in this proceeding.

1194, 10 L.Ed.2d 215 (1963). The three components or essential elements of a *Brady* prosecutorial misconduct claim are (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching, (2) the evidence must have been suppressed by the State, either willfully or inadvertently, and (3) prejudice must have ensued. *See Banks v. Dretke,* 540 U.S. 668, 124 S.Ct. 1256, 1272, 157 L.Ed.2d 1166 (2004); *Strickler v. Greene,* 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999).

In the instant case, the record of the trial reflects that the prior statement of Skee Callen was provided to defense counsel. In fact, the precise matter raised in this petition was made the basis of trial counsel's cross examination of this witness. Further, regarding the testimony of the pathologist, Petitioner raises questions concerning the qualifications of this expert and truthfulness of his testimony in other cases. Petitioner produced correspondence from another expert that expresses opinions contrary to those expressed by the pathologist who testified at the trial. However, Petitioner has not shown that any of this information was in the possession of the prosecution at or before his trial, or that prejudice ensued from any nondisclosure. Therefore, Petitioner's allegations fail to establish a prima facie case. Petitioner's third claim for relief is denied.

E. Prosecutor's Argument

In Petitioner's fourth claim, he alleges that his right to remain silent, as guaranteed by the First and Fourteenth Amendments, was denied by the prosecutor's argument that Petitioner showed no remorse. Respondent

argues that this statement summarized evidence before the jury showing lack of remorse along with Petitioner's emotionless demeanor displayed during the trial.

> "For there to have been a denial of one's fifth amendment right to remain silent, the prosecutor's manifest intent in making the remark must have been to comment on the defendant's silence, or the character of the remark must have been such that the jury would naturally and necessarily construe it as a comment on the defendant's silence. To expound on the first inquiry, the prosecutors intent is not manifestly impermissible if there is some other, equally plausible explanation for the remark. For the second inquiry, the question is not whether the jury might or probably would view the challenged remark in this manner, but whether it necessarily would have done so."

Jackson v. Johnson, 194 F.3d 641, 652 (5th Cir.1999) (citations omitted).

In *Jackson,* the prosecutor's comment, "Look at him, he hasn't shown any remorse," during final argument, made in the context of the defendant's conduct immediately after the incident, was not considered a comment on the defendant's failure to testify. *See also Moore v. State,* 849 S.W.2d 350, 352 (Tex.Crim.App.1993) ("when there is evidence in the record indicating a lack of remorse, a comment upon the defendant's lack of remorse does not naturally and necessarily lead the jury to understand it to be a comment upon the defendant's failure to testify.").

Similarly, the Fourth Circuit Court of Appeals concluded that an argument similar to that made in the instant case did not constitute a violation of the defendant's

Fifth Amendment right to remain silent at sentencing. *Bates v. Lee,* 308 F.3d 411, 421 (4th Cir.2002), *cert. denied,* 538 U.S. 1061, 123 S.Ct. 2223, 155 L.Ed.2d 1113 (2003). The Fourth Circuit had previously "found that prosecutorial comments about the lack of remorse demonstrated by a defendant's demeanor during trial do not violate a defendant's Fifth Amendment right not to testify." *Id.; see also Howard v. Moore,* 131 F.3d 399, 421 (4th Cir.1997); *Gaskins v. McKellar,* 916 F.2d 941, 951 (4th Cir.1990). Distinguishing comments regarding what a defendant failed to say from those regarding the defendant's demeanor during trial, the court concluded that the defendant in that case "was not, of course, obligated to show remorse for his murder of Jenkins either before or during trial. However, the absence of any indication of contrition on his part for the taking of another human life was not beyond the range of prosecutorial comment during sentencing." *Bates,* 308 F.3d at 421-22; *see also Borodine v. Douzanis,* 592 F.2d 1202, 1210-11 (1st Cir.1979) (holding argument that defendant never had a "shred of remorse from the beginning right up until now" was probably intended and understood as a reflection on the defendant's expressionless courtroom demeanor rather than on his right not to take the stand).

The state court on habeas review found that these comments referred to Petitioner's expressions to others and his impassive mien in court, signifying a cavalier attitude about the offense. Petitioner has not shown that these findings are incorrect. Accordingly, Petitioner's fourth claim for relief is denied.

F. Cumulative Error

In his tenth and final claim, Petitioner alleges that the cumulative effect of violations noted in his preceding claims constitutes an independent violation of the Constitution. Although the Court has found a constitutional violation for failure to instruct the jury on mitigating evidence, the Court has also found Petitioner's other allegations meritless or improperly before the Court. Accordingly, there is nothing to cumulate in support of federal habeas corpus relief. *See Yohey v. Collins,* 985 F.2d 222, 229 (5th Cir.1993). Therefore, Petitioner's tenth claim for relief is denied.

V.

CONCLUSION

For each of the reasons set out above, Petitioner's sixth claim for relief is granted and each of the other claims for relief is denied. A writ of habeas corpus shall issue to the Respondent, vacating Petitioner's sentence and commuting it to life, unless, within 180 days from the entry of the judgment in this matter, the State of Texas grants Petitioner a new sentencing hearing or commutes his sentence to life. Judgment will be entered accordingly.

It is SO ORDERED.

442 F.3d 273

United States Court of Appeals, Fifth Circuit.

Brent Ray BREWER, Petitioner-Appellee,

v.

Doug DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent-Appellant.

No. 04-70034.

March 1, 2006.

Michael Dennis Samonek, Denton, TX, for Brewer.

Edward Larry Marshall, Austin, TX, for Dretke.

Appeal from the United States District Court for the Northern District of Texas.

ON PETITION FOR REHEARING

Before JOLLY, SMITH and GARZA, Circuit Judges.

PER CURIAM:

The petition for panel rehearing is DENIED. The prior opinion, *Brewer v. Dretke,* 410 F.3d 773 (5th Cir.2005), is WITHDRAWN, and the following opinion is substituted:

Before JOLLY, SMITH and GARZA, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

The district court conditionally granted, pursuant to 28 U.S.C. § 2254, death row inmate Brent Brewer's petition for writ of habeas corpus, holding that the special issues submitted during his punishment phase were a constitutionally inadequate vehicle for the jury to give effect to his mitigating evidence. The state appeals on the grounds that the court failed (1) properly to assess the

reasonableness of the state court's adjudication as required by 28 U.S.C. § 2254(d) and (2) correctly to apply valid Supreme Court and Fifth Circuit precedent. We reverse and render judgment denying the habeas petition.

I.

Brewer was sentenced to death for a murder committed during a robbery. At trial, he introduced a variety of mitigating evidence, including the following facts: that he had a bout with depression three months before the murder; that he was briefly hospitalized for that depression;[1] that his co-defendant, a woman with whom he was apparently obsessed, dominated and manipulated him;[2] that he had been abused by his father;[3] that he had

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[1] The state's brief reveals that Brewer's mental illness claim is not based on an especially strong factual predicate:

> Brewer was not adjudged mentally retarded, however he was involuntarily committed on January 1, 1990 for "major depression, *single episode, without psychotic features,* poly-substance abuse." The examining physician based his opinion on a *suicide note [Brewer] wrote to his mother.* On January 25, [Brewer] signed a request for *voluntary admission to* Big Springs [*sic*] State Hospital for fourteen days.

(Emphasis added.) These facts differ dramatically from those in *Bigby v. Dretke,* 402 F.3d 551, 571 (5th Cir.), *cert. denied,* ___ U.S. ___, 126 S.Ct. 239, 163 L.Ed.2d 221 (2005), in which the petitioner's "evidence indicated that his schizophrenia was chronic and severe, caused him to suffer delusions with respect to the actions and motivations of the people around him, could not be adequately treated, and significantly impacted his interpersonal relationship abilities."

[2] This evidence was not medical and did not go to Brewer's volition; it consists merely of lay observations that the woman was the alpha partner in the relationship.

[3] There was no evidence that Brewer's child abuse in any way impaired his cognitive abilities.

witnessed his father abuse his mother; and that he had abused drugs.[4] Brewer did not secure expert psychological or psychiatric evidence because of a decision, made in consultation with his attorney, that such material would not be in his best interest. Brewer submitted at least seven proposed instructions designed to give effect to the mitigating evidence that he did present, but the trial court denied all of those instructions and, instead, required only that the jury answer two special questions relating to deliberateness and potential for future dangerousness.

The conviction was affirmed on direct appeal,[5] after which Brewer initiated what were ultimately unsuccessful state habeas proceedings.[6] He then filed the instant federal habeas petition. After requesting supplemental briefing concerning *Tennard v. Dretke*, 542 U.S. 274, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004), the district court, as we have said, granted conditional relief.

II.

A.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), at 28 U.S.C. § 2254(d), sets forth the conditions under which a court shall grant a petition for a writ of habeas corpus:

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[4] This evidence apparently consisted of Brewer's use of marihuana as a teenager.

[5] *Brewer v. State*, No. 71,307 (Tex.Crim.App.1994) (unpublished), *cert. denied*, 514 U.S. 1020, 115 S.Ct. 1367, 131 L.Ed.2d 223 (1995).

[6] *Ex parte Brewer*, No. 46,587-01 (Tex.Crim.App.2001) (unpublished).

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Section 2254(d)(1) addresses pure questions of law and mixed questions of law and fact. *See Martin v. Cain,* 246 F.3d 471, 475 (5th Cir.2001). Under the first ("contrary to") clause, a federal district court may grant habeas relief if the state court decided a case differently from how the United States Supreme Court decided a case on a set of materially indistinguishable facts. *Williams v. Taylor,* 529 U.S. 362, 412-13, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Under the second ("unreasonable application") clause, a court may grant habeas relief if the state court correctly divined a legal principle from the Supreme Court's jurisprudence but misapplied that principle to the facts. *See id.*

Section 2254(d)(2) addresses pure questions of fact. *See Moore v. Johnson,* 225 F.3d 495, 501, 504 (5th Cir.2000). Under this subsection, federal courts must give deference to state court findings of fact unless they are

based on an unreasonable interpretation of the evidence presented in the state court proceeding.[7]

B.

We review the federal district court's findings of fact for clear error and its conclusions of law *de novo*. *See Martinez v. Johnson*, 255 F.3d 229, 237 (5th Cir.2001). The legal conclusion at issue is the holding that "[r]eviewing the evidence in light of the special issues, a jury would be very hard pressed to see the evidence presented as anything but aggravating. Failure to submit an instruction on mitigation evidence was an unreasonable application of federal law and Supreme Court precedent."[8] Section 2254(d)(1) therefore controls our review, and we conduct a *de novo* inquiry to determine whether the state court's decision is contrary to, or an unreasonable application of, clearly established Supreme Court precedent.[9] We do so here by analyzing *de novo* the federal district court's decision to see whether it properly decided that the state court did not satisfy § 2254(d)(1).

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[7] *See Chambers v. Johnson*, 218 F.3d 360, 363 (5th Cir.2000) (as modified on denial of rehearing). Factual determinations made by the state court are presumptively correct and will not be disturbed unless the petitioner rebuts the presumption by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1).

[8] As we will discuss momentarily, this language – stating that the mitigating evidence was capable of nothing but an aggravating interpretation – seems somewhat at odds with language earlier in the opinion stating that "the evidence at Petitioner's trial does not fit squarely [in the dangerousness instruction] either. One could view the evidence as either aggravating or mitigating."

[9] The district court rejected seven additional habeas claims that Brewer included in his petition. Brewer does not cross-appeal these rulings.

III.

The trial court instructed the jury, pursuant to article 37.071 of the Texas Code of Criminal Procedure (Vernon 1991), as follows:

> Special issue No. 1
>
> Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant, BRENT RAY BREWER, that caused the death of the deceased, Robert Doyle Laminack, was committed deliberately and with the reasonable expectation that the death of the deceased would result?
>
> Special issue No. 2
>
> Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, BRENT RAY BREWER, would commit criminal acts of violence that would constitute a continuing threat to society?

A.

We consider it appropriate to devote significant space to discussing the jurisprudence associated with article 37.071. In *Jurek v. Texas,* 428 U.S. 262, 272, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), the Court upheld the Texas statutory special issues approach in the punishment phase of capital trials, but did so on the explicit premise that the special issues were capable of an expansive construction to capture proper mitigation evidence. In *Franklin v. Lynaugh,* 487 U.S. 164, 179, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988), the Court made plain that, at least with respect to some mitigation evidence, deviating from the special

issues approach is not necessary. Specifically, it found the "dangerousness" special issue was capable of capturing evidence of the petitioner's good behavior while incarcerated.

In *Penry v. Lynaugh,* 492 U.S. 302, 322, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) ("*Penry I*"), the Court held that the two special issues were not sufficient to give mitigating effect to Penry's evidence of mental retardation and a history of abuse. It stated that each of those factors represents " 'a two-edged sword': [Each] may diminish [the petitioner's] blameworthiness for his crime even as it indicates there is a probability that he will be dangerous in the future." *Id.* at 324, 109 S.Ct. 2934.

Four years after *Penry I,* the Court decided *Johnson v. Texas,* 509 U.S. 350, 367-68, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993), in which the defendant invoked *Penry I* in an attempt to invalidate his death sentence – a sentence imposed despite his evidence of youth. *See id.* at 368, 113 S.Ct. 2658. The future dangerousness issue alone, the Court concluded, gave the jurors a constitutionally sufficient vehicle for considering Johnson's youth in making its reasoned moral response.[10] "It strains credulity to suppose that the jury would have viewed the evidence of petitioner's youth as outside its effective reach in answering the second special issue." *Id.*

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[10] *Johnson,* 509 U.S. at 368, 113 S.Ct. 2658 ("The relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside. We believe that there is ample room in the assessment of future dangerousness for a juror to take account of the difficulties of youth as a mitigating force in the sentencing determination.").

After *Johnson,* therefore, it was indisputable that *Jurek* remained good law and that, although some relevant evidence may receive constitutionally insufficient mitigating effect under the standard Texas special issues (*e.g.,* evidence of mental retardation), other evidence is quite capable of being given mitigating effect through that methodology. When mitigating evidence falls into that latter category, the imposition of the death penalty under the pre-*Penry I* scheme does not offend the Eighth Amendment.

In following *Penry I,* this court developed a two-part test for determining whether the defendant's evidence requires a special mitigation instruction: (1) whether the proffered material was constitutionally relevant mitigating evidence and (2) whether the proffered evidence was beyond the effective reach of the jurors.[11] We in turn defined "constitutionally relevant" evidence as that which was "due to the uniquely severe permanent handicaps with which the defendant was burdened through no fault of his own . . . ."[12] In *Tennard,* however, the Supreme Court flatly rejected that test of constitutional relevance and instructed us instead that the definition of relevance in this context is no different from the definition of relevance in most others: "any tendency to make the existence of any fact that is of consequence to the determination of

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[11] *Smith v. Cockrell,* 311 F.3d 661, 680 (5th Cir.2002) (internal citations and quotations omitted).

[12] *Graham v. Collins,* 950 F.2d 1009, 1029 (5th Cir.1992) (en banc), *aff'd,* 506 U.S. 461, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993).

the action more probable or less probable than it would be without the evidence . . . ."[13]

B.

For the mitigating evidence to be within the effective reach of the jury in answering the special issues, the special interrogatories must be capable of giving relevant evidence constitutionally sufficient mitigating effect. Whether that sufficiency requires that the evidence be given "full," or merely "some," mitigating effect has been the subject of considerable discussion in this court,[14] but ultimately the distinction is only one of semantics, because regardless of what label is put on the word "effect," it is indisputable that the effect must be constitutionally "sufficient." Even if the requirement is called "full," it means nothing more than "sufficient." We now turn to the district court's application of this standard for the purpose of deciding, under the facts and circumstances of this case, whether the special interrogatories allowed the jury to give such sufficient mitigating effect to the evidence in question.

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[13] *Tennard*, 542 U.S. at 283, 124 S.Ct. 2562 (internal citations and quotations omitted.). *Tennard* further clarified that impaired intellectual functioning is inherently mitigating (and therefore must be capable of being given mitigating effect through the special jury instructions) and is subject to the same legal analysis as is mental retardation for purposes of a *Penry I* claim. *See id.* at 287, 124 S.Ct. 2562.

[14] *Compare Coble v. Dretke*, 417 F.3d 508, 527 (5th Cir.2005) *with Cole v. Dretke*, 418 F.3d 494, 496-511 (5th Cir.2005).

C.

To determine whether a jury has sufficient vehicles for considering mitigating evidence, the habeas court must determine whether "there is no reasonable likelihood that the jury would have found itself foreclosed from considering the relevant aspects of the [mitigating evidence]." *Johnson,* 509 U.S. at 368, 113 S.Ct. 2658. We conduct a *de novo* inquiry into whether the district court applied this standard properly, and we conclude that it did not.

As we noted earlier, at trial Brewer introduced a variety of mitigating evidence, including the following facts: that he had a bout with depression three months before the murder; that he was briefly hospitalized for that depression; that his co-defendant, a woman with whom he was apparently obsessed, dominated and manipulated him; that he had been abused by his father; that he had witnessed his father abuse his mother; and that he had abused drugs.[15] Apparently the district court seriously considered only the mental illness and drug abuse as potentially warranting habeas relief.[16] Brewer offered

[15] For further explanation of each of set of proffered evidence, *see* notes 1-4, *supra.*

[16] There is considerable authority that evidence of a troubled childhood falls within the scope of the special issues. *See Graham,* 506 U.S. at 475, 113 S.Ct. 892; *Jacobs v. Scott,* 31 F.3d 1319, 1327 (5th Cir.1994). Comparison of *Graham* and *Penry I* reveals a constitutional distinction between, on the one hand, "severe" abuse of the type Penry sustained and, on the other, a "mere" troubled childhood of the sort Graham experienced. In *Graham* the Court seems to sanction such a side-by-side comparison as a permissible way of conducting the inquiry. *See Graham,* 506 U.S. at 476, 113 S.Ct. 892.

There is no easy way to locate Brewer at either pole. First, the trial evidence indicates that Brewer's father hit Brewer "numerous" times but, because of the timing of the father's reintroduction into the family,

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evidence of one hospitalization for a single episode of non-psychotic major depression that was at least partially a result of a suicide note he had written to his mother.

This circuit has made a distinction between mental retardation and mental illness.[17] A mental illness inquiry does not require any adjustment to the standard two-pronged interrogatory, and we have rejected habeas petitions on these grounds on other occasions.[18] The only

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this abuse could not have occurred until Brewer was at least fifteen (Penry was subject to abuse beginning at a very young age.). Although the abuse was more than an isolated incident, it does not rise to the level of that at issue in *Penry*. *See Penry I*, 492 U.S. at 309, 109 S.Ct. 2934. Moreover, as noted earlier, Brewer and his attorney made an informed decision not to present expert psychiatric testimony.

Second, *Penry I* considers the mitigation issue in light of Penry's mental retardation and child abuse, *evaluated as a single unit*. *See also Cole*, 418 F.3d at 502 (alluding to the mitigating evidence as that of Cole's "destructive family background *and* organic neurological deficiency") (emphasis added). The vast majority of subsequent caselaw has addressed mental retardation in isolation. It is thus doubtful that Brewer's child abuse, without additional evidence of cognitive limitation, had mitigating effects sufficiently beyond the jury's reach to constitute a violation of the Eighth Amendment.

For the remaining issues (other than mental illness, substance abuse, and troubled childhood), it was at least reasonably likely that the special issue involving dangerousness did not foreclose consideration of the mitigating evidence. *See Cole, id.* at 508. To understand why the district court did not undertake a serious discussion of the other five pieces of evidence, *see* notes 1-4, *supra*.

[17] *See Robison v. Johnson*, 151 F.3d 256, 265-66 (5th Cir.1998).

[18] *See, e.g., Hernandez v. Johnson*, 248 F.3d 344, 349 (5th Cir.2001) (holding that the future dangerousness special issue was capable of giving effect to this mitigating evidence); *Lucas v. Johnson*, 132 F.3d 1069, 1082-83 (5th Cir.1998) (holding that the deliberateness special issue was capable of giving this evidence effect). These cases remain good law even after *Tennard*, because *Tennard* overturned only Fifth Circuit methodology for determining what mitigating evidence is

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instances in which mental illness has given rise to *Penry I* violations involve those where the illness in question is chronic and/or immutable. *See, e.g., Bigby* (in which petitioner suffered from chronic paranoid schizophrenia).[19] In *Graham* the Court stated:

> [W]e are not convinced that *Penry* could be extended to cover the sorts of mitigating evidence Graham suggests without a wholesale abandonment of *Jurek* and perhaps also of *Franklin v. Lynaugh* .... *Jurek* is reasonably read as holding that the circumstance of youth is given constitutionally adequate consideration in deciding the special issue. We see no reason to regard the circumstances of Graham's *family background* and positive character traits in a different light. Graham's evidence of transient upbringing and otherwise nonviolent character more closely

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constitutionally relevant. *See Tennard,* 542 U.S. at 285-87, 124 S.Ct. 2562.

[19] The *Bigby* court decided that the second special issue (future dangerousness) was incapable of acting as an exculpatory vehicle for this evidence:

> Furthermore, although this Circuit has previously held that mitigation evidence of mental illness could be considered within the context of the second special issue, future dangerousness, if the illness can be controlled or go into remission, *see e.g., Lucas [v. Johnson],* 132 F.3d 1069; *see also Hernandez v. Johnson,* 248 F.3d 344 (5th Cir.2001), Bigby's mitigation evidence indicated that his condition cannot be adequately controlled or treated .... In short, Bigby's evidence that his mental disorders made it difficult for him to avoid criminal behavior has the same "double-edged sword" quality as Penry's evidence that he was unable to conform his conduct to the law.

Bigby, 402 F.3d at 571.

> resembles Jurek's evidence ... than it does Penry's ....

Graham, 506 U.S. at 476, 113 S.Ct. 892 (emphasis added).

More recently, this court in *Cole* has explained why evidence of a troubled childhood may, as a result of its temporary character, fall sufficiently within the ambit of the special dangerousness instruction: "Given the experts' testimony during the punishment phase, the jury could have believed them and found that, although Cole suffered a turbulent childhood and may suffer from diminished impulse control, he is capable of change and thus would not necessarily remain a danger in the future." *Cole,* 418 F.3d at 507. In *Coble,* a panel of this court made an analysis that is consistent with *Cole* on this point of law: "This Circuit has previously held that mitigating evidence of mental illness could be considered within the context of the second special issue, future dangerousness, if the illness can be controlled or go into remission."[20]

Although *Graham* and *Jacobs* provide sufficient authority for our determination that the special issues are here capable of giving Brewer's evidence of a troubled childhood constitutionally mitigating effect, our court's more recent opinions in *Cole* and *Coble* bolster that proposition considerably. Cole presented evidence of destructive family background and of organic neurological defects that arguably amounted to a lack of impulse control.[21] The *Cole*

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[20] *Coble,* 417 F.3d at 523 (citing *Lucas v. Johnson,* 132 F.3d 1069, 1082-83 (5th Cir.1998); *Robison v. Johnson,* 151 F.3d 256, 266 (5th Cir.1998)).

[21] In *Cole,* the state presented the following mitigating evidence: (1) Cole's mother was an alcoholic unable to care for her children; (2) Cole's father was arrested for robbery; (3) Cole's father deserted the family

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court relied on *Graham*'s holding that "family background evidence falls within the broad scope of Texas's special issues."[22]

In *Coble* and *Cole,* moreover, the record contained expert psychiatric evidence that bore both on the defendants' future dangerousness and other potential issues relating to mental impairment.[23] Even if Brewer had proved mental illness (which it appears he did not), and even if mental illness were tantamount to mental retardation for the purposes of our case law (which it is not), Brewer came nowhere near to producing evidence sufficient for us to grant relief.

Cole offers the following summary of the caselaw:

> As the expert testimony intimated that Penry was unable to learn from his mistakes, the *Johnson* court concluded that the only logical manner in which Penry's jury could have considered the evidence of his mental retardation under the future dangerousness special issue was as an aggravating factor: Penry would remain a danger in the future because there was no chance that he would ever understand that rape and murder

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when Cole was five years old; (4) Cole's mother moved with her children to her parent's home; (5) Cole's grandparents were alcoholics who did not want the children; (6) Cole was isolated from other children because his grandparents' home was eight miles out of town; (7) Cole had difficulty getting to school; (8) Cole was placed in a children's home at the age of five; (9) while there, his mother visited him only twice; (10) his father never visited him there; and (11) his uncle adopted his brother, but not him. *Cole,* 418 F.3d at 499-500.

[22] *Id.* at 507 (internal quotations omitted) (citing *Graham,* 506 U.S. at 476, 113 S.Ct. 892).

[23] *See, e.g., id.* at 505-06, 113 S.Ct. 892; *Coble,* 417 F.3d at 522-23.

> were wrong. Thus, Penry's jury was unable to give any mitigating effect to the mental retardation evidence that he proffered.

Cole, 418 F.3d at 505 (footnote omitted). The *Cole* panel went on to distinguish the evidence before it from that in *Penry I* on the ground that, because the evidence indicated that Cole's condition was capable of being cured and that he was capable of learning from his mistakes, the future dangerousness question could also give the psychiatric evidence constitutionally sufficient mitigating effect. *See id.* at 505-07.

We confront an even more extreme case here. There does not appear to be one iota of evidence suggesting either that Brewer's condition is permanent or that he experienced cognitive limitations of any sort as the result of it.

We likewise have rejected claims that mitigating evidence pertaining to substance abuse, without an adjustment to the sentencing issues, can support a *Penry* violation.[24] Generally these cases stand for the proposition that, even under the two-pronged special issue methodology, a jury can adequately incorporate evidence of short-term mental illness and substance abuse into its decision calculus.[25]

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[24] *See, e.g., Harris v. Cockrell,* 313 F.3d 238, 242 (5th Cir.2002) (holding that the "jury was able to give mitigating effect to the evidence of Harris's alcoholism through its answers to the first and second special issues"); *James v. Collins,* 987 F.2d 1116, 1121 (5th Cir.1993) (holding that voluntary intoxication can be given effect through the deliberateness prong).

[25] Moreover, we hesitate to infer any diminished capacity in moral or analytic reasoning in light of the fact that Brewer has a tested IQ of 115, placing him in roughly the ninety-fourth percentile of human intelligence.

Therefore, the district court erred in granting Brewer's petition for a writ of habeas corpus. The judgment is REVERSED, and judgment is RENDERED denying the petition.

2006 WL 1528242 (Mem)

___ S.Ct. ___, 75 USLW 3203

Supreme Court of the United States

Brent Ray **BREWER**, petitioner,

v.

Nathaniel QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Institutions Division.

No. 05-11287.

Oct. 13, 2006.

Case below, *Brewer v. Dretke,* 442 F.3d 273.

Motion of petitioner for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted. The case is consolidated and a total of one hour is allotted for oral argument.